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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 74–112

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition of
ADVENT CORP.
Concerning Modification of Previously Granted Waiver of TV Comparable Tuning Rules

FEBRUARY 6, 1974.

DAVID RICHARDSON, Esq.,
Peabody & Arnold,
53 State Street,
Boston, Mass. 02109

DEAR MR. RICHARDSON: This concerns a "Petition by Advent Corporation for Modification of a Previously Granted Waiver of the TV Comparable Tuning" Rules, filed on December 20, 1973.

By letter of March 13, 1973, the Commission authorized Advent Corporation to combine a continuous UHF tuner with a detented VHF tuner on 1000 units of one specially designed television receiver model through February 15, 1974. A copy of that letter is attached hereto. Advent now requests that the waiver be modified to cover a maximum of 700 receivers to be manufactured not later than June 30, 1974. The request is occasioned by start-up and production problems which have delayed and limited production. Reasons favoring a modification of the waiver are essentially the same as those favoring its initial grant and are recited in the Commission's March 13, 1973 letter. The production of 700 sets through June 30, 1974 should have even less effect on UHF television (if any) than the production of 1000 sets through February 15, 1974.

Accordingly, the Commission's comparable tuning rules are hereby waived to permit Advent Corporation to combine a continuous UHF tuner with a detented VHF tuner on 700 units of one specially designed television receiver model through June 30, 1974.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554, March 13, 1973.

DAVID RICHARDSON, Esq.,
Peabody & Arnold,
53 State Street,
Boston, Mass. 02109

DEAR MR. RICHARDSON: This concerns a petition for waiver of the comparable tuning rules (47 CFR 15.68 and 15.69(a)(3)) filed on be-

104-026—74——1

half of Advent Corporation of 195 Albany Street, Cambridge, Massachusetts on February 6, 1973. A grant of the request would permit combination of a UHF continuous tuner with a detented VHF tuner on a maximum of 1,000 units of one specially designed television receiver model. VHF and UHF tuning would be AFC-aided. UHF readout would be at five channel intervals. The waiver would not apply to receivers manufactured after February 15, 1974, even if fewer than 1,000 units had been produced by that date.

The television receiver in question is described by Advent as projecting a color or monochrome signal from a broadcast, videotape or cable source onto a curved 4 x 5½ foot screen located eight feet from the receiver. The picture is comparable in brightness to that shown in commercial movie theatres and is intended to be viewed in a darkened room. It is intended that the system be set up in a permanent position, as proper focus is dependent on precise positioning of the projector and screen. Advent expects to sell the system direct to retail customers at a price of approximately $2500.00 per system. It has planned to produce 1,000 units during the first year of production, beginning in February 1973, and during this period hopes to develop a broad market for the system. Advent anticipates that the initial primary market for the system would be in industrial training and education applications where it would most likely be used with videotape or closed-circuit programming and the "lack of comparable tuning would be of no consequence." An initial secondary market is expected to be "fraternal organizations, service clubs, taverns and other facilities where prearranged, serious, communal viewing would be the normal use." Where people gather together for scheduled viewing of a particular program such as a major sporting event, the company believes that the lack of comparable tuning would not discourage the viewing of UHF programs. It is not expected that many of the systems will be sold to individuals or, in any event, that they would be used for casual home viewing, since they are intended for group viewing in a specially prepared environment.

This is the first television receiver Advent has developed and it is the only receiver it has decided to produce. A waiver of the percentage of models requirement is therefore not required. Since the receiver was not produced prior to January 1, 1972, however, waiver of the "new model" requirement is required.

Advent originally planned to commence production of its receiver in October 1972. Components, including 300 UHF continuous tuners, were ordered in anticipation of such production. A November 15, 1972 prospectus filed by the company in connection with an initial stock offering stated that Advent expected to introduce the receiver late in 1972. For reasons not associated with the tuner, however, production was delayed until February 1973. Advent has only recently learned that television receiver models first manufactured after January 1, 1972 must be equipped for comparable UHF tuning. It is proceeding to redesign its receiver to accommodate a comparable UHF tuner. However, substitute tuners are available only on a 20–26 week delivery schedule on the one hand or on a minimum order of 20,000 units basis on the other. Moreover, redesign of the receiver will require 10–12 months.

Advent believes that it would suffer a "major public embarrassment and damage to its reputation" if it is forced to again delay introduction of its system or to offer it without broadcast receiving capability, particularly in view of the fact that individuals have purchased the company's stock on the basis of representations as to the late 1972 introduction date set out in its prospectus. It is also concerned that marketing of an incomplete system would seriously impair its efforts to develop a broad market for its system.

On the facts presented, we think that a waiver of the comparable tuning rules is warranted. Advent is new to the television receiver business and proceeded in ignorance of the "new model" requirement. Ignorance alone does not, of course, excuse compliance. Since becoming aware of the requirement. Advent has nevertheless proceeded diligently to develop a source for a comparable tuner and to commence redesign of its receiver to accommodate it, and we are satisfied by this effort that Advent has proceeded in good faith. The small number of units, and the cost and special design features which suggest business and institutional usage and non-broadcast applications, are also factors. In these circumstances, our rules should not be so implemented as to discourage introduction of an innovative product. Nor should they be rigidly applied to a small firm seeking entry into a new market.

Accordingly, §§ 15.68 and 15.69(a)(3) are waived to permit Advent Corporation to combine a continuous UHF tuner (with channel readout at 5 channel intervals) with a detented VHF tuner on 1,000 units of one specially designed television receiver model through February 15, 1974.

Commissioner H. Rex Lee concurring in result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 74-121

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of AMERICAN TELEVISION & COMMUNICATIONS CORP., SENATH, MO. For Certificate of Compliance	CAC-2442 M0086

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION:

1. On April 27, 1973, American Television and Communications Corporation (ATC) filed the above-captioned application for certificate of compliance to commence cable television service at Senath, Missouri, (Pop. 1,534), a community allegedly located outside all major and smaller television markets. ATC proposes to carry the following television broadcast signals:

WREC-TV (CBS, Channel 3)	Memphis, Tenn.
WMC-TV (NBC, Channel 5)	Do.
WKNO-TV (Educational, Channel 10)	Do.
WHBQ-TV (ABC, Channel 13)	Do.
WBBJ-TV (ABC, Channel 7)	Jackson, Tenn.
WPSD-TV (NBC, Channel 6)	Paducah, Ky.
KAIT-TV (ABC, Channel 8)	Jonesboro, Ark.
KFVS-TV (CBS, Channel 12)	Cape Girardeau, Mo.

Carriage of the above-listed signals is consistent with Section 76.57 of the Commission's Rules, and ATC's franchise, granted February 5, 1973, and amended November 4, 1973, is consistent with Section 76.31 of the Commission's Rules.

2. On June 4, 1973, a letter was filed on behalf of George T. Hernreich, licensee of Station KAIT-TV, Jonesboro, Arkansas. KAIT-TV states its belief that Senath, Missouri, is not located outside all major and smaller television markets, but rather is located within the specified zone of the Jonesboro, Arkansas, smaller television market. If Senath is located in the Jonesboro smaller television market,[1] then its proposed carriage of Station WBBJ-TV, Jackson, Tennessee, would be inconsistent with the provisions of Section 76.59 of the Commission's Rules, which governs signal carriage in smaller television markets.[2] KAIT-TV concludes that even if Senath is located

[1] Section 76.5(f) defines the specified zone of a television broadcast station as:
The area extending 35 air miles from the reference point in the community to which that station is licensed or authorized by the Commission.

[2] Absent Station WBBJ-TV, ATC's proposed signal carriage would be consistent with Section 76.59 of the Rules. Except for Station WKNO-TV, these signals are significantly viewed in Dunklin County in which Senath is located, and their carriage would be consistent with Section 76.59(a)(6) of the Rules; carriage of educational Station WKNO-TV would be consistent with Section 76.59(c) of the Rules.

beyond the specified zone of Jonesboro, "there is absolutely no need for carriage of what would be a third ABC-affiliated station [WBBJ–TV] on this system, which would only serve to fragment our [KAIT–TV's] audience." In response to KAIT–TV's letter, ATC has submitted an engineering statement which concludes that Senath is actually 35.63 miles from the Jonesboro, Arkansas, reference point, and thus located outside the Jonesboro smaller television market.

3. KAIT–TV's contentions must be rejected. The Commission finds ATC's engineering statement persuasive; therefore, since Senath is located outside all major and smaller television markets, carriage of WBBJ–TV is consistent with Section 76.57 of the Commission's Rules. Since carriage of WBBJ–TV is consistent with the Rules, KAIT–TV's protest to its carriage must essentially be considered a request for special relief. However, in Paragraph 113 of the *Cable Television Report and Order*[3] we explained that "there must be a substantial showing to warrant deviation from the go, no-go concept of the Rules." The "substantial showing" standard was clarified in *Gerity Broadcasting Co.*, FCC 72–651, 36 FCC 2d 69 (1972), in which we held that such showings must "contain specificity of fact, showing injury to the public" before special relief could be granted. *See See-Mor Cable TV of Sikeston, Inc.*, FCC 73–796, 42 FCC 2d 261 (1973); *Fort Smith TV Cable Co.*, FCC 73–151, 39 FCC 2d 573 (1973); *Spectrum Cable Systems, Inc.*, FCC 73–257, 40 FCC 2d 1019 (1973), recons. denied, FCC 73–1342, — FCC 2d — (1973). KAIT–TV's bare allegation of audience fragmentation falls well short of this requirement and is mere conjecture, not warranting special relief.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the letter filed in opposition to CAC–2442 on June 4, 1973, on behalf of George T. Hernreich, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–2442) filed by American Television and Communications Corporation IS GRANTED, and the appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] FCC 72–108, 36 FCC 2d 143, 187 (1972).

F.C.C. 74–127

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
AMERICAN TELEVISION & COMMUNICATIONS CORP., (KZW–67), NEODESHA, KANS.	CMPCAR–220
AMERICAN TELEVISION & COMMUNICATIONS CORP., GARNETT, KANS. (WRC–23)	CMPCAR–221
AMERICAN TELEVISION & COMMUNICATIONS CORP., IOLA, KANS. (WRC–24)	CMPCAR–222
AMERICAN TELEVISION & COMMUNICATIONS CORP. (WRC–25), CHANUTE, KANS.	CMPCAR–223
For Construction Permits in the Cable Television Relay Service	

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On February 14, 1973, over the objections of Southeast Kansas Microwave, Inc., the Commission adopted *American Television Communications Corporation*, FCC 73–191, 40 FCC 2d 894, wherein it authorized ATC to construct four cable television relay stations to serve its cable television systems at Chanute, Parsons, Neodesha, and Independence, Kansas. Southeast Kansas appealed this decision to the United States Court of Appeals for the District of Columbia Circuit. Thereafter, it was discovered that there were engineering errors in site coordinates for the permits which had been granted; accordingly, remand of the cases was sought and obtained from the Court.

2. The above-captioned applications propose modifications in the earlier permits which are designed to cure the earlier engineering problems. Southeastern Kansas again objects to the applications with two new arguments:[1] (a) ATC's earlier applications were so carelessly prepared as to reflect adversely on its qualifications to be a Commission licensee, and (b) ATC's earlier applications were not candid since they failed to reveal that no steps had been taken to determine whether the applicant's proposed microwave sites would be available to it. The first contention does not cause much difficulty: our review indicates that exhibits in the earlier applications had identified the correct site locations, and the use of the incorrect coordinates was obviously inadvertent. On the other hand, the site availability issue is of concern—both because of the considerable importance attached to

[1] Should Southeastern Kansas again appeal, it will of course be entitled to reargue its earlier objections; however, it has not reargued them to the Commission so they are not addressed in this Memorandum Opinion and Order.

it in other services regulated by the Commission, and because it appears here as a matter of first impression before the Commission. On balance, we do not believe that the "reasonable assurance" test for site availability, which has been developed in other areas, should—standing alone—call either for evidentiary hearing or for denial of an application for a cable television relay station. Compare, e.g., *Lake Erie Broadcasting Company*, 31 FCC 2d 45, 46 (1971).

3. There is, we believe, fundamental difference between cable television relay stations and the types of stations which have been proposed in the earlier cases concerned with site availability. The earlier cases involved competitive services where an applicant's disqualification would not be expected to have any adverse impact on the general public—rather, the implicit presumption has been that the adversary process followed in comparative proceedings would generate the best qualified applicant. But this presumption is not applicable to operation of cable television relay stations since these stations are authorized only for use by cable television operators in conjunction with their systems.[2] In these circumstances, disqualification of an applicant could only serve to injure the subscribers to its system by depriving them of the benefits of the improved service they otherwise would receive. In practical terms, we are sure that lack of competition for facilities has encouraged applicants for cable television relay stations to be less methodical in their prosecution of applications than we would desire.[3] Consequently, we do not believe that further consideration of Southeastern Kansas' objections is required; nonetheless, we do believe it appropriate to observe that ATC's prosecution of its applications has been less than satisfactory, and we caution both it and other cable television relay applicants that in aggravated cases we will still consider denial of permits as a sanction intended to protect the integrity of our processing procedures.

In view of the foregoing, the Commission finds that American Television and Communications Corporation is fully qualified, and that a grant of the above-captioned applications would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the "Petition to Deny" filed November 15, 1973, by Southeast Kansas Microwave, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications ARE GRANTED in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] Section 78.11(c) of the Rules provides that,

> Cable television relay station licenses may be issued to cable television owners or operators and to cooperative enterprises wholly owned by cable television owners or operators.

[3] We note ATC's assurance that it has now assured the availability of its proposed sites. This is, of course, the preferable approach to follow.

F.C.C. 74–115

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 17 OF THE COMMISSION'S RULES TO PRESCRIBE HIGH INTENSITY LIGHTING OF ANTENNA STRUCTURES	Docket No. 19931

NOTICE OF PROPOSED RULEMAKING

(Adopted February 6, 1974; Released February 11, 1974)

BY THE COMMISSION:

1. Notice is hereby given of proposed additions to Part 17 of the Rules as set forth in the attached appendix.

2. On March 1, 1973, the Federal Aviation Administration (FAA), in keeping with its statutory responsibility for promoting safety in air commerce, issued a Notice of Proposed Change looking toward augmenting the standards described in its Advisory Circular 70/7460–1, Obstruction Marking and Lighting, so as to permit the use of high intensity (strobe) obstruction lighting systems on skeletal structures.[1] At the same time the FAA proposed to delete the requirement for obstruction marking skeletal structures with aviation surface orange and white paint where high intensity strobe lighting is employed. Since the FCC Rules relate closely to those of the FAA in this area, the Commission is of the view that a comparable amendment to the FCC Rules is warranted so as to be consistent. However, the additional provisions are intended as an alternative to, and not a substitution for, the current rule provisions, which continue in effect.

3. Generally, high intensity lighting systems are appropriate to structures 500 feet or more above ground level. However, the Commission may prescribe high intensity lighting in all instances where the FAA study establishes that the conventional obstruction marking and lighting is inadequate to insure air safety or, in the event that such lighting is an option exercised by the proponent, where the FAA finds that the application of such lighting would not be detrimental to air safety. Existing antenna structures would be unaffected; however, the Commission may prescribe high intensity lighting for such structures, following study by and upon the recommendation of the FAA, if an existing antenna structure is altered or replaced by a similar structure.

4. High intensity lighting systems normally will be prescribed as a self-contained 24-hour obstruction lighting system. Where such lighting is applied to an existing and conventionally lighted antenna

[1] Notice published in 38 F.R. 6711 on March 12, 1973.

structure, or in special cases where the use of the high intensity lighting system at nighttime may be objectionable, the Commission may prescribe or restrict the high intensity lighting system for display during daytime only in which event the conventional red obstruction lighting system would be prescribed for nighttime. The high intensity lighting system, however, is adjustable to overcome most expected objections.

5. High intensity lighting systems have been installed on television antenna structures in Worcester, Mass. (WMTW–TV) as well as in Camden and Trenton, New Jersey (WNJS and WNJT, respectively). Observations of these installations has established that during daylight hours the high intensity lighting system is sufficiently effective to eliminate the need for the aviation surface orange and white painting. Consequently, the proposed rules would make the obstruction painting optional in those instances where high intensity lighting systems are employed. High intensity lighting systems are currently being installed or considered for at least a dozen other tall antenna structures.

6. The proposed amendments are authorized in accordance with Sections 4(i), 303(q), and 303(r) of the Communications Act of 1934, as amended. Comments may be filed in accordance with the provisions of Section 1.415 on or before March 25, 1974; reply comments on or before April 5, 1974. The Commission may consider in addition to all relevant and timely comments, other available pertinent data before taking final action.

7. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all comments, reply comments, pleadings, briefs, and other documents shall be furnished the Commission. These will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Sections 17.39–17.42 are added new to Subpart C to read as follows:

HIGH INTENSITY LIGHTING

17.39 Specifications for High Intensity Lighting of antenna structures 300 feet or less in height.

Antenna structures up to and including 300 feet in height above ground level which are required to be obstruction lighted with high intensity lights as a result of an FAA study, or which are so lighted at the option of the permittee or licensee, shall be lighted as follows:

(a) There shall be installed at the top of the skeletal tower three or more strobe light units meeting the requirements of FAA/DOD Specification L–856, High Intensity Obstruction Light Systems. The units shall emit a white high intensity light of not less than 200,000 candelas throughout 360° of horizontal arc about the structure to ensure that the light system is visible from aircraft at any normal angle of approach. The intensity shall be decreased to approximately 20,000 candelas during twilight, and to approximately 4,000 candelas at night.

(b) Where a rod, antenna, or similar appurtenance of 20 or more feet extends above the main skeletal framework a single unit high intensity omni-directional white light, similar in appearance to a 300 mm red electric code beacon, shall be installed at the highest point of the structure in addition to the lights required in (1) above. This light shall produce a daytime and twilight intensity of approximately 20,000 candelas and be decreased at nighttime to an intensity of approximately 4,000 candelas.

(c) All lamps shall flash simultaneously at 40 pulses per minute. The system shall be equipped with a light sensitive control device adjusted so that the daytime to twilight intensities are automatically changed when the north sky illuminance level falls or rises to between 60 and 30 foot candles, and so that the twilight to nighttime intensities are automatically changed when the north sky illuminance level falls or rises to between 5 and 2 foot candles.

17.40 Specifications for High Intensity Lighting of antenna structures over 300 feet up to and including 600 feet in height.

Antenna structures over 300 feet up to and including 600 feet in height above ground level which are required to be obstruction lighted with high intensity lights as a result of an FAA study, or which are so lighted at the option of the permittee or licensee, shall be lighted as follows:

(a) There shall be installed at the top of the skeletal tower three or more strobe light units meeting the requirements of FAA/DOD Specification L–856, High Intensity Obstruction Light Systems. The units shall emit a white high intensity light of not less than 200,000 candelas throughout 360° of horizontal arc about the structure to ensure that the light system is visible from aircraft at any normal angle of approach. The intensity shall be decreased to approximately 20,000 candelas during twilight, and to approximately 4,000 candelas at night.

(b) At the approximate midpoint of the skeletal tower there shall be installed a similar set of high intensity strobe lights.

(c) Where a rod, antenna, or similar appurtenance of 20 or more feet extends above the main skeletal framework a single unit high intensity omni-directional white light, similar in appearance to a 300 mm red electric code beacon, shall be installed at the highest point of the structure in addition to the lights required in (1) above. This light shall produce a daytime and twilight intensity of approximately 20,000 candelas and a nighttime intensity of approximately 4,000 candelas.

(d) All lamps shall flash simultaneously at 40 pulses per minute. The system shall be equipped with a light sensitive control device adjusted so that the daytime to twilight intensities are automatically changed when the north sky illuminance level falls or rises to between 60 and 30 foot candles, and so that the twilight to nighttime intensities are automatically changed when the north sky illuminance level falls or rises to between 5 and 2 foot candles.

17.41 Specifications for High Intensity Lighting of antenna structures over 600 feet up to and including 1,000 feet in height.

Antenna structures over 600 feet up to and including 1,000 feet in height above ground level which are required to be obstruction lighted with high intensity lights as a result of an FAA study, or which are so lighted at the option of the permittee or licensee, shall be lighted as follows:

(a) There shall be installed at the top of the skeletal tower three or more strobe light units meeting the requirements of FAA/DOD Specification L–856, High Intensity Obstruction Light Systems. The units shall emit a white high intensity light of not less than 200,000 candelas throughout 360° of horizontal arc about the structure to ensure that the light system is visible from aircraft at any normal angle of approach. The intensity shall be decreased to approximately 20,000 candelas during twilight, and to approximately 4,000 candelas at night.

(b) At the approximate ⅓ and ⅔ levels of the skeletal tower there shall be installed a similar set of high intensity strobe lights.

(c) Where a rod, antenna, or similar appurtenance of 20 or more feet extends above the main skeletal framework a single unit high intensity omni-directional white light, similar in appearance to a 300 mm red electric code beacon, shall be installed at the highest point of the structure in addition to the lights required in (1) above. This light shall produce a daytime and twilight intensity of approximately 20,000 candelas and a nighttime intensity of approximately 4,000 candelas.

(d) All lamps shall flash simultaneously at 40 pulses per minute. The system shall be equipped with a light sensitive control device adjusted so that the daytime to twilight intensities are automatically changed when the north sky illuminance level falls or rises to between 60 and 30 foot candles, and so that the twilight to nighttime intensities are automatically changed when the north sky illuminance level falls or rises to between 5 and 2 foot candles.

17.42 Specifications for High Intensity Lighting of antenna structures over 1,000 feet in height.

Antenna structures over 1,000 feet in height above ground level which are required to be obstruction lighted with high intensity lights as a result of an FAA study, or which are so lighted at the option of the permittee or licensee, shall be lighted as follows:

(a) There shall be installed at the top of the skeletal tower three or more strobe light units meeting the requirements of FAA/DOD Specification L–856, High Intensity Obstruction Light Systems. The units shall emit a white high intensity light of not less than 200,000 candelas throughout 360° of horizontal arc about the structure to ensure that the light system is visible from aircraft at any normal angle of approach. The intensity shall be decreased to approximately 20,000 candelas during twilight, and to approximately 4,000 candelas at night.

(b) At approximate equidistant levels along the vertical axis of the skeletal tower there shall be installed three or more sets of similar lights (one additional set of lights is required for each additional 400 feet, or fraction thereof, of antenna structure greater than 1,000 feet).

(c) Where a rod, antenna, or similar appurtenance of 20 or more feet extends above the main skeletal framework a single unit high intensity omni-directional white light, similar in appearance to a 300 mm red electric code beacon, shall be installed at the highest point of the structure in addition to the lights required in (1) above. This light shall produce a daytime and twilight intensity of approximately 20,000 candelas and a nighttime intensity of approximately 4,000 candelas.

(d) All lamps shall flash simultaneously at 40 pulses per minute, and be equipped with a light sensitive control device adjusted so that the daytime to twilight intensities are automatically changed when the north sky illuminance level falls or rises to between 60 and 30 foot candles, and so that the twilight to nighttime intensities are automatically changed when the north sky illuminance level falls or rises to between 5 and 2 foot candles.

F.C.C. 74-150

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. HAWAIIAN TELEPHONE CO. ITT WORLD COMMUNICATIONS, INC. RCA GLOBAL COMMUNICATIONS, INC. WESTERN UNION INTERNATIONAL, INC. Applications for Authority Under Section 214 of the Communications Act of 1934 To Participate in the Acquisition and Operation of a Satellite Transponder Between the United States Mainland and Hawaii	File Nos. P-C-8775, T-C-2600, T-C-2598, T-C-2599

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 14, 1974)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. The Commission has under consideration:

(a) Our Memorandum Opinion and Order and Authorization in this matter, FCC 74-27, released January 11, 1974;

(b) An amendment to Comsat Application No. 165 filed on February 4, 1974;

(c) A letter filed by Western Union on February 6, 1974, responding to the Comsat amendment;

(d) Telexes filed by Western Union International and ITT Worldcom, Inc. on February 8, 1974;

(e) Numerous related letters filed by interested parties.

2. In our prior order herein, we reviewed and approved, with modifications, Comsat's proposal to lease an entire transponder in an Intelsat IV satellite in orbit over the Pacific Ocean for a period of 22 months, and to offer significant rate reductions to the voice and record carriers serving the mainland-Hawaii route. Currently, Comsat charges the carriers $5,000 per month for a through circuit on this route. At the then current usage level of 312 circuits, the monthly cost to the carriers totalled $1.56 million. Comsat proposed to charge only $750,000 per month for the entire transponder, or $2,400 per circuit. Moreover, the nominal capacity of the transponder is given by Comsat as 432 voice grade circuits so that if all were employed, the per circuit rate would be even lower. In view of the substantial reductions being proposed, Comsat contended that the requirement for 22 months retention of the traffic was necessary, in order to assure Comsat that it would not suffer a net loss of revenues. The carriers to whom the offer was

made, American Telephone and Telegraph Company (AT&T), Hawaiian Telephone Company (HTC), RCA Globcom, Inc. (RCA), ITT Worldcom, Inc. (ITT) and Western Union International, Inc. (WUI), agreed to the terms of the proposed tariff, and AT&T and HTC proposed, in turn, rate reductions to the public, reflecting a percentage of the savings attributable to the lower per circuit costs to be borne by the carriers.

3. Upon consideration, we approved Comsat's proposal to set a rate for mainland-Hawaii traffic on the basis of the lease of an entire transponder, with corresponding reductions in the per circuit costs to the carriers. We indicated that such a proposal would advance the integration of Hawaii into the domestic rate pattern, reduce rates to Hawaii, and pass on to the ratepayers the economic benefits inherent in satellite communications. We did not, however, accept all the terms presented to us. Most importantly, we indicated that the 22 month term of the tariff posed the danger of undue interference in the free play of competitive forces which we had envisioned in the operation of U.S. domestic satellite facilities. That is, we found that the forced retention of the Hawaiian traffic for a period of almost a year and a half on the Intelsat system beyond the time when a competitive alternative would be available was not in the public interest. Accordingly, we provided that the term of the authorization could be for no more than 12 months, automatically renewable unless affirmative action were taken to deny renewal.

4. At the same time, we also indicated that we had serious problems with the carriers' proposed rate reductions. AT&T and HTC proposed a 25% reduction in private line rates, from $6,500 (through rate) to $4,900 per month. For MTT, the voice carriers proposed that the already planned 20% rate reduction which was to take place September 1, 1974 in accordance with our *Transpac II* decision, 43 FCC 2d 505 (1973) be advanced to May 1, 1974. The record carriers simply indicated that the private line rate proposed by the voice carriers would not permit them to earn a fair return on investment but offered no other rate reduction proposals. In no case, moreover, did any of the affected carriers propose to flow through to the ratepayers the entire reduction applicable to them on a dollar for dollar basis. Accordingly, we indicated that we were not satisfied with the showing which the carriers had made in reference to the proposed rate reductions, and concluded that further review of the entire question would be required if Comsat and the carriers elected to implement the transponder arrangements as modified by our decision:

> We are firmly of the view that the reduction in charges enjoyed by AT&T, HTC, and the record carriers should be reflected promptly and fully in rates to the public.
>
> * * * * * * *
>
> There remains, however, a substantial question as to the degree to which the rate reductions proposed by AT&T and HTC fully reflect the reduction in charges afforded by the transponder lease. In view of this, we shall require that within 10 days from the effective date of our authorization, each file a complete showing either that such rate reductions do so reflect its savings, or alternatively, file such other reductions to take effect on normal statutory notice, as will so fully reflect such savings. Similarly, as a condition to participation

by the record carriers in the reduced transponder charge, we shall require that they file within 10 days of the effective date of this authorization, revised charges for their mainland-Hawaii services, or such of them as fully reflect the savings to be realized by the transponder lease, * * *. (*AT&T et al.*, FCC 74-27, para. 20).

5. In addition, we required AT&T and HTC to justify the level of charges proposed for the private line circuits. Finally, we indicated that in the event any of the carriers had cogent reasons "not to pass on the full savings to the public", such reasons should be set forth, supported by a full explanation.

6. We also indicated that the showing made by Comsat to justify the charge of $750,000 per month was not entirely adequate to assure us that the rate was just and equitable under the Communications Act and applicable precedent. Specifically, we indicated that Comsat's showing did not satisfactorily demonstrate that the continuing revenues to be derived from the arrangement would adequately cover the actual incremental investment and operating costs properly attributable to the service. Accordingly, grant of the authorization was conditioned on Comsat's immediately filing a showing that it would not recover from any other services revenue requirements attributable to the transponder.[1]

7. We now have before us a request by Comsat for approval of changes in the terms of the transponder tariff proposal. Comsat has agreed to modify the terms of the tariff offering to make the commitment period 10.5 months beginning February 15, 1974[2] rather than 22 months beginning January 1, 1974. However, Comsat seeks approval of an upward adjustment in the monthly transponder rate from $750,000 to $970,000. This represents a per circuit cost of approximately $3000, based on the current total of 322 circuits in use. On the basis of a financial analysis appended to its request, Comsat argues that the higher charges are necessary to permit Comsat to show a net earnings increase for the proposed 10.5 months of the transponder tariff, and to comply with the Commission's condition that Comsat demonstrate that no other service will be burdened by the proposed transponder rate. Comsat's analysis is designed to show that in 1974 the proposed $970,000 monthly rate for 10.5 months would meet all incremental costs attributable to the full 21 month term and make a contribution of $284,000 beyond such costs, and that in 1975 and 1976 Comsat's ratepayers would not be burdened with any revenue requirements attributable to the transponder arrangement.[3]

8. Both AT&T and HTC, by letter, have advised the Commission that in view of the modified arrangements proposed by Comsat, and the attendant smaller savings as against the pre-existing rate, they would have to adjust downward the savings they had proposed to pass

[1] We also required Comsat to provide that service be made directly available to all interested carriers rather than, as Comsat initially proposed, to provide the entire transponder to AT&T and HTC and require them in turn to make the appropriate number of circuits available to the record carriers.

[2] The transponder tariff is now to become effective February 15, 1974 and will terminate on December 31, 1974.

[3] Even though the tariff by its terms will expire (unless renewed with Commission approval) in December 1974, Comsat will be obligated to pick up certain additional Intelsat costs attributable to the lease of the transponder since Intelsat is continuing to require a long term lease (21 months) on the part of Comsat. In effect, Comsat is proposing to set the rate high enough in 1974 to meet all the incremental costs including those which will not actually be incurred until 1975 and 1976.

on to the public. Noting that the increase in the monthly transponder charge translates into additional costs for 1974 of some $3.5 million, the voice carriers propose to reduce their proposed rate reductions by approximately the same amount. They would accomplish this by reducing the private line rate only to $5200 per month rather than the $4900 previously proposed, and by delaying the approximate 20% MTT reduction from May 1, 1974, as previously scheduled, to July 1, 1974.[4] HTC in addition directs itself to two additional matters: the justification for the proposed private line rate of $5,200 per month, and in response to the language of paragraph 20 of our original order, the propriety and sufficiency of the rate reductions HTC is proposing.

9. The proposed AT&T–HTC cost reductions for the remainder of 1974 amount to some $6.8 million, whereas the two carriers are proposing to reduce their own rates in private line and MTT service some $3.7 million, according to staff calculations.[5] This suggests that the voice carriers are proposing to retain as additional earnings some 45% of the satellite cost reductions, and to pass on about 55% to the public. HTC argues it would not be appropriate for it to pass on the full cost savings to its ratepayers because HTC itself is earning only 7.6% on average invested capital, and the revenue effect of HTC's current proposal would raise its overall return only to 7.8%. While AT&T has not addressed itself at length to the requirement in our prior order that it fully pass through the cost savings or supply cogent reasons for not doing so, it endorses generally the approach taken by HTC and suggests that in the absence of retention by AT&T of some portion of the savings, there is no incentive to search for cost saving devices. The record carriers have all asked for permission to defer responding to the issue of the amount of their rate reductions until Comsat has indicated that it will agree to provide service on terms acceptable to the Commission. Accordingly, we do not now have before us their responses on this aspect of the matter.[6]

10. In its letter dated February 6, 1974, opposing the Comsat proposal Western Union sets forth an offer of its own. Assuming that WU could begin providing service through its own satellite facilities on July 1, 1974, WU estimates that it could save the carriers a total of approximately $1.6 million for calendar year 1974 as against the Comsat proposal. This estimate is based on the assumption that the carriers would continue to take service through Comsat on a circuit by circuit basis until June 30, 1974, whereupon they would switch to the WU satellite and receive service for the remainder of the year at a cost of $1.2 million for space segment and $180,000 for earth station costs.[7]

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[4] These views are expressed in letters to the Commission submitted by AT&T on January 28, 1974, and by HTC on January 31, 1974. Both letters were based on an informal proposal of Comsat which differed from that ultimately filed in two minor respects: the monthly transponder cost was $1 million, and the term of rental was to be 11 months. In the proposal actually filed by Comsat, the lower monthly cost and shorter term approximately offset each other in terms of the net savings to AT&T and HTC.

[5] Assuming, as AT&T does in related calculations, a growth rate of almost 20% annually for MTT growth on the Mainland-Hawaii route. See Amendment to Joint Application filed April 10, 1972, App. A Table I.

[6] However, ITT has indicated in a summary fashion its views on the question of rate reductions. See par. 19, *infra*.

[7] The WU offer does not reflect any earth station costs for the Hawaiian end of the circuit, but WU notes that HTC may wish to lease the facilities from Comsat at Paumalu. By way of estimate what such a lease might cost, WU observes that it can make earth station facilities available on the mainland for $180,000 on a fully compensatory basis.

WU proposes to charge the carriers $1.2 million annually per transponder but to provide two transponders for the period July 1, to December 31. WU claims that in this way the carriers would be able to derive up to 1000 circuits as against the 432 which Comsat claims is available on the Intelsat satellite transponder. WU recognizes that there may be some slippage in its planned launch and operational dates, but notes that it has launch failure insurance, and would be ready to reimburse the carriers for additional costs they would have to bear beyond those chargeable by WU for continuing to use Comsat during the period of delay. WU also contends that the pricing approach reflected in Comsat's submission is invalid in a number of respects and either is, or has the potential to be, predatory pricing. Finally, recognizing that AT&T and HTC have in the past expressed reluctance to rely on a system which was not then in operation, and for which no firm pricing proposals had been made, WU urges the Commission to require those carriers to justify their continuing commitment to the Comsat proposal.

11. After considering all the potential benefits and detriments of the Comsat proposal and that of WU, we believe that the modified Comsat proposal now before us is in the public interest, and we will approve it. We note that Comsat has complied with the two essential limitations we imposed in our prior order: that the term of the tariff offering be until December 31, 1974, and that Comsat make a showing that the rate it proposes to charge for the period proposed will cover incremental costs and not involve unlawful cross-subsidization from other services or routes. While the cost saving now proposed by Comsat is not as great as that first tendered by it, there will nevertheless be a total savings to the carriers for calendar year 1974 of about $6.8 million.[8] We are also satisfied that under the terms currently proposed by Comsat there will be no unlawful cross-subsidization, and that the tariff period of 10½ months will not unduly restrict the competitive alternatives which may become available during the latter half of 1974. We will, however, modify our prior order in one respect, in view of the changed terms proposed by Comsat: the authorization to be issued for the lease of the transponder will not be automatically renewable. Rather, if Comsat and the carriers wish to continue to provide service, they will have to formally apply for such authority. In this context, we reiterate, the parties urging a continuation of such service will be obliged to direct themselves to the alternatives then available, and to justify their election to continue taking satellite service from Comsat, as set out in para. 19 of our prior order herein. Moreover, we wish to give the parties fair notice that in considering the advisability of continuing the transponder tariff beyond December 31, 1974, we will not allow Comsat to price its services on a basis which would make it impossible for an existing competitor to bid for the traffic on reasonable terms. That is to say, notwithstanding the fact that Comsat's current proposal will permit it to recover in 1974 all the incremental costs associated with a 21 month lease of the transponder,

[8] Assuming 322 satellite circuits at present plus a 20% MTT growth rate for the remainder of calendar year 1974.

we will require Comsat to set a rate for 1975 or beyond based on a reallocation to the then current year of that portion of the total incremental costs of the transponder lease which are properly attributable thereto. To the extent that this requirement has the effect of permitting Comsat to earn a return beyond that currently contemplated by it, we believe the additional contribution should serve to reduce the corporation's revenue requirements. We will expect, therefore, that if such additional net revenues are to be earned, Comsat will make an offsetting reduction in other services or routes.

12. We have given the WU proposal the most careful consideration but we cannot conclude at this time that it is appropriate to require the carriers to take service through the WU satellite. Our reluctance is premised basically on two factors. WU has not yet been authorized to serve Hawaii, and we are not prepared at this juncture to make the policy determination that it should be. This is not to say that such authorization may not be forthcoming at a later time, but only that the question whether WU should serve Hawaii is bound up in the broad policy issues posed by the proper treatment of services and carriers between the mainland and Hawaii and we cannot resolve that issue in the narrow context of the present Comsat application. Beyond this aspect of the matter, we attach considerable importance to the fact that the WU system is not presently in operation, and there can be no certainty that it will be in operation on July 1, 1974, or on any specific date thereafter. Since the first commercial communications satellite was launched and placed into service in 1965, there have been numerous delays, difficulties, and cost overruns in the emplacement and functioning of such facilities. While we have no reason to doubt Western Union's capabilities in particular in bringing their system on-line as scheduled and at the rates indicated, this prior record argues strongly for a somewhat more conservative approach.

13. Even if the satellite were to be on station and ready to provide service by July 1, 1974, as WU anticipates, there remains the irreducible fact that WU does not have operational experience in this field, and may not be able to provide the assurance Comsat can regarding the prospects of reliable and adequate service. Nor do we think the availability of launch failure insurance is an adequate substitute. If WU were to encounter a delay in providing service or difficulty in the nature of temporary or erratic service interruptions, it might be impractical for the carriers to restore the service on an interim or temporary basis via Intelsat facilities. Finally, while WU alleges that Comsat's cost and price submission is inadequate or misleading in a number of respects, no back up data or worksheets are provided to substantiate WU's implicit assumption that its costs are correctly calculated. Indeed, we have reservations about that data and upon further analysis the cost savings of some $1.6 million which WU projects (before Hawaiian earth station costs are considered) appears to be open to serious challenge.[9] We note that under the conditions set out in our

[9] For example, we note that WU estimates that the cost to the carriers of continuing to take service through Comsat on a circuit by circuit basis until June 30, 1974 would be $7.2 million based on an estimate of 322 circuits at $5000. per month for 4.5 months. However, WU assumes that by June 30, 1974, there will have been no growth in circuitry. This is plainly an erroneous assumption, since this increases the savings under the Comsat proposal.

January 13, 1974 order herein, the Comsat offering expires on December 31, 1974, and we are specifying in this order that with respect to the carriers' determination of which satellite services they will use after that date, we expect a thorough analysis of the relative merits of the systems available at that time. Inasmuch as the WU system should be operational well before that date and will have established a record of performance, albeit a brief one, we believe a more meaningful comparison of the two systems can be carried out by the carriers and analysed by us at that time.

14. This brings us to the question of the rates to be charged by the carriers for their services provided under the transponder lease. As indicated above, the voice carriers are proposing to make reductions to the public which we estimate to be slightly more than 50% of the savings they will enjoy from the lower per circuit costs available on the transponder. Neither HTC nor AT&T has provided what we would regard as cogent reasons for their proposal to retain almost half the savings on the transponder service. HTC implies that its overall return of 7.6% for 1973 is adequate justification for it to retain such a large portion of the transponder savings. However the 7.6% return on average invested capital represents HTC's total return on both interstate and intrastate service. No showing is made that the return for the interstate service—to which these savings will accrue—is as low as 7.6%. Indeed, data based on the most recent cost allocation study carried out by us suggests that interstate earnings may be in the range of 14%–16%.

15. In addition to supporting HTC's "basic philosophy", AT&T notes the net revenue effect on its rate of return on net investment would be even less than in the case of HTC. But AT&T does not indicate what its percentage return on international service is, nor offer any justification of its determination to retain almost half of the savings. AT&T does, however, suggest that 100% flow through would not be appropriate because without some benefit to AT&T, there would be no incentive to search "for cost-saving devices". While it is true that incentives should be built into regulation for cost savings which flow from internal economies, technological innovations, or the like, we find this argument unconvincing in respect to the current situation in which the cost saving is in no way attributable to the efforts of AT&T, but rather are in the nature of a windfall. This determination by the carriers to retain almost half the cost savings on the mainland-Hawaii route is particularly troubling in view of our clearly expressed desire in the *Second Report and Order* (*Domestic Satellite Service*) to see the rates to the off-shore domestic points lowered. See 35 FCC 2d 844 at 856–8. We note that neither AT&T nor HTC has taken issue, as a matter of principle, with our views, expressed in para. 20 of the prior order, that carriers should in the first instance either pass along fully the cost savings, or, if they believe they cannot or should not do so, adequately justify their position.

16. In view of the foregoing we conclude that the AT&T and HTC proposed rate reductions now before us are inadequate and unacceptable. We note that Section 201(c)(5) of the Communications Satellite Act of 1962 requires us to engage in such ratemaking procedures as

will insure that "any economies made possible by a communications satellite system are appropriately reflected in *rates for public communications services*" (emphasis added). We interpret this language to mean that the present cost savings should be made available primarily to the public rather than the carriers, and this in turn requires that the savings be flowed through to the ratepayers under these unique circumstances.

17. We will therefore require, as a condition to our approval of their participation in the transponder lease arrangement, that AT&T and HTC pass on at least 80% of any savings resulting therefrom in the form of rate reductions for Hawaii/Mainland traffic. As indicated above, AT&T and HTC responded to Comsat's changed proposal by delaying the 20% MTT reduction from May 1, 1974 to July 1, 1974. We believe an 80% flow through of their cost savings will enable these carriers to adhere more closely to the original schedule for rate reductions, and we will expect them to file within 10 days of the release of this Order such revised plans and schedules and the necessary justification therefor.[10]

18. We note that in accordance with para. 58 subpart 5 of our recent decision *NSS–GTE*, 43 FCC 2d 1141, FCC 73–961, released September 12, 1973, the telephone carriers are obligated to file, no later than March 12, 1974, their proposals for the integration of Hawaii into the domestic rate pattern for MTT. These proposals involve far more basic and long term ratemaking principles than the present matter, and the question of the present cost savings can and will be considered as one of many factors in reviewing AT&T's, GTE's and HTC's proposals for rate reductions on the mainland-Hawaii route. Indeed, we note that AT&T has indicated in contemplation of the March, 1974 reporting requirement that it anticipates "a further substantial reduction in the rates for mainland-Hawaii message telephone service".[11] We will therefore require the telephone carriers enjoying the savings attributable to the transponder service to specifically consider that factor in advising this Commission as to their intentions in respect to further rate reductions pursuant to the *NSS–GTE* decision and the *Second Report and Order*.

19. By telex message dated February 8, 1974, ITT and WUI have responded to the amended Comsat application. Both carriers support the proposal. ITT argues that the private line rate should be set at $5.850 per month, which amounts to a 10% reduction, arguing that its return for such service at that rate would be approximately 5.5%. With respect to its other services, ITT simply declines to make any rate adjustments on the ground that such services "are not as facility cost oriented" as the private line service. WUI believes the Comsat application should be granted, but only on condition that Comsat make other rate reductions which WUI alleges were previously promised by Comsat but never made. We will permit the telephone carriers' proposed private line rate of $5.200 to become effective on not less than one day's notice as proposed by them. The record carriers may, if they

[10] Agreement to do so shall be transmitted to us by letter no later than the effective date of the Comsat tariff.
[11] Letter to Common Carrier Bureau dated November 19, 1973.

wish, match that rate, or may elect to set a higher rate and risk the loss of business. In the absence of some indication that the $5,200 rate is predatory, and there is none, we are not inclined to permit the higher cost carrier to dictate the rate level. Nor are we persuaded by ITT's contentions with respect to its other services. As in the case of the telephone carriers, we will require that they file, within 10 days of the release date hereof, their own proposals for rate reductions in their services, to reflect, at a minimum, a pass through of 80% of the savings to be derived from the transponder lease.[12] Our grant of authority to the record carriers to join in the transponder arrangement is conditional upon the filing of a written commitment no later than February 15, 1974, of their agreement to make such reductions. Their continuation in the arrangements is also conditioned upon our acceptance of the reductions filed by them. As to the argument advanced by WUI, we do not believe this is the appropriate context in which to consider the question whether Comsat has failed to make reductions to which it committed itself, or, if it has so failed, what the appropriate remedy may be. We note that the Comsat Rate Case, Docket 16070, is still in process, and that negotiations are now being considered as a possible resolution of that proceeding. WUI is of course free to raise such considerations in that context.

20. We emphasize that with respect to all of the rates proposed by Comsat and the carriers in connection with the transponder service, our actions are not to be taken as approval of the ratemaking principles employed nor of the propriety or lawfulness of the rates themselves but only a determination to interpose no objections at this time.

21. Accordingly, IT IS ORDERED, that our prior Memorandum Opinion, Order and Authorization is modified to the extent set forth herein and paragraphs 24, 25(B)(H) and 26(A) ARE DELETED, and the 30 day filing requirement of paragraph 25(C) IS MODIFIED to require filing within 15 days of the release of this order.

22. IT IS FURTHER ORDERED, that Comsat's amended application No. 165 IS GRANTED subject to the terms and conditions of this order, and Comsat IS AUTHORIZED to file, on not less than one day's notice, Tariff FCC No. 10, to become effective February 15, 1974.

23. IT IS FURTHER ORDERED, that the applicants shall comply with the provisions of paragraphs 11 and 17, and 19 herein.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[12] We assume the carriers will apportion the savings among their services on an appropriate basis, such as, e.g., the proportionate amount of circuitry required for each service. Reductions below the level so derived should not be used to minimize reductions on other services.

F.C.C. 74-140

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of BELL SYSTEM TARIFF OFFERINGS OF LOCAL DISTRIBUTION FACILITIES FOR USE BY OTHER COMMON CARRIERS; AND LETTER OF CHIEF, COMMON CARRIER BUREAU, DATED OCTOBER 19, 1973, TO LAURENCE E. HARRIS, VICE PRESIDENT MCI TELECOMMUNICATIONS CORP.	Docket No. 19896

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 11, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. In a Memorandum Opinion and Order to Show Cause, FCC 73-1299, released December 13, 1973, modified FCC 74-79, released January 25, 1974, we directed the Bell System companies (Bell) to show cause why they should not be ordered to cease and desist from, *inter alia*, altering the provisions of exchange of facilities contracts with the Western Union Telegraph Company (Western Union); engaging in any conduct which would result in a denial of, or delay in establishing, physical connection with MCI [1] or the other specialized common carriers which have intervened in this proceeding for their authorized or pending interstate services; or from implementing any policy or practice which would foreclose the said carriers from establishing through routes in connection with such interstate services. Since it appeared from the information before us that the material facts were not in dispute and an evidentiary hearing was unnecessary, we directed the parties to file briefs, scheduled oral argument for March 4, 1974, and directed the parties to address themselves at the argument to certain questions which were deemed essential to reaching a decision in this proceeding. Pending the issuance of a decision or other order of the Commission, the parties to the exchange of facilities contracts were required to continue to furnish the services and facilities specified therein.

2. Now before the Commission for consideration is a petition filed January 11, 1974, by Bell requesting that this matter be designated for an evidentiary hearing, and that the Commission reconsider its order requiring Bell to continue to furnish service to Western Union pursuant to its exchange of facilities contracts. Oppositions to Bell's petition were filed on January 16, 1974, by the Chief, Common Carrier Bureau; on January 21, 1974, by MCI Telecommunications Cor-

[1] MCI Telecommunications Corporation and MCI-New York West, Inc.

poration and MCI-New York West, Inc. (MCI); on January 22, 1974, by American Satellite Corporation (ASC); and on January 24, 1974, by Western Union and by Data Transmission Company (Datran). A reply to the oppositions was filed by Bell on February 5, 1974.

3. Bell argues that the private line services for which the specialized common carriers seek interconnection include foreign exchange (FX) and common control switching arrangements (CCSA) services, that these types of interconnection have not been considered previously by the Commission, and that Bell is therefore entitled to an evidentiary hearing under Section 201(a) of the Communications Act. It also contends that under Section 312 of the Act an evidentiary hearing is a prerequisite to the issuance of a cease and desist order. In further support of its request for an evidentiary hearing, Bell sets forth a number of matters which it urges should be explored at such a hearing before a public interest determination is made as to the advisability or need for interconnection.

4. Bell's request for an evidentiary hearing must be denied both because it is premature and because the allegations of its petition fail to persuade us that we erred in our determination to proceed by way of briefs and oral argument. Among the matters upon which we have directed the parties to comment are questions going to whether the Commission had heretofore ordered Bell to provide interconnection pursuant to Section 201(a) of the Act, whether such interconnection is required pursuant to rule or regulation within the contemplation of Section 312 and, if so, the scope of the order or rule or regulation with particular reference to interconnection for FX and CCSA services. In our view these and other legal and policy issues discussed in our order scheduling oral argument should be resolved as expeditiously as possible and manifestly no evidentiary hearing is required for their resolution.

5. Furthermore, Bell's pleading, which does little more than recite broad and general areas of inquiry which it believes should be explored in an evidentiary hearing, is insufficient to justify favorable action for the relief which it requests. No specific factual allegations are advanced in support of its intimation of dire consequences from interconnection or to indicate the presence of significant unresolved factual questions. Consequently, we adhere to the view that no evidentiary hearing is warranted at this stage of the proceeding.

6. With respect to the request that we reconsider our order directing it to adhere to the exchange of facilities contracts, Bell argues that the contracts are outside of our jurisdiction, citing a Commission letter dated December 20, 1945, and the efforts of the Commission in 1964 to amend the Communications Act, H.R. 10270, in order to expressly provide for jurisdiction over exchange of facilities contracts. Bell further argues that even if we have jurisdiction, our order continuing the contracts is a prescription which is permissible only after a hearing.

7. We find no merit to these contentions. No sufficient reasons have been advanced to justify any departure from the procedure heretofore specified, and we shall therefore withhold judgment as to the jurisdictional and other questions raised by Bell until we hear oral argument and have had an opportunity to study the briefs which the parties

to the proceeding have been directed to file. In the meantime we deem it to be imperative in the public interest that the *status quo* be maintained with respect to all matters pertaining to such contracts until a final decision is issued in this case.

8. Bell's further contention that our order constitutes a prescription within the meaning of Section 205 must likewise be rejected as without merit. We have not prescribed rates or taken other action under Section 205 but have merely directed that the *status quo* be maintained with respect to the existing contracts between Bell and Western Union pending our study of the questions presented, and such an interim order is clearly within the broad authority granted by Sections 4(i) and 4(j) of the Communications Act. We shall therefore expect Bell to comply fully with the directive in our December 13, 1973, order that it "act in strict accordance with the provisions of outstanding exchange of facilities contracts."

9. Accordingly, IT IS ORDERED, that the petition, filed January 11, 1974, by the Bell System companies, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R–47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JOHN F. BURNS, THOMAS RIEKE, AND RAYMOND VOSS, D.B.A., BURNS, RIEKE & VOSS ASSOCIATES, IOWA CITY, IOWA	Docket No. 19596 File No. BP–17838
BRAVERMAN BROADCASTING CO., INC., IOWA CITY, IOWA	Docket No. 19597 File No. BP–19134
For Construction Permits	

APPEARANCES

Roy F. Perkins, Jr., on behalf of John F. Burns, Thomas Rieke, and Raymond Voss, d/b as Burns, Rieke and Voss Associates; *Robert W. Healy*, on behalf of Braverman Broadcasting Company, Inc.; *Robert A. Beizer* and *John C. Quale*, on behalf of Johnson County Broadcasting Corporation; and *Theodore D. Kramer* and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 8, 1974; Released February 13, 1974)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND PINCOCK.

1. The above-captioned mutually exclusive applications for a new standard broadcast station in Iowa City, Iowa were designated for hearing by Commission Memorandum Opinion and Order, FCC 72–858, released October 5, 1972, 37 FR 21867, on issues to determine whether Burns, Rieke and Voss Associates (BR&V) is financially qualified to construct its proposed station and on a standard comparative issue. The hearing was conducted by Administrative Law Judge Frederick W. Denniston who released an Initial Decision, FCC 73D–60, on November 29, 1973, concluding that BR&V is not financially qualified to construct and operate its proposed station, and granting the application of Braverman Broadcasting Company, Inc. (Braverman). On December 28, 1973, Johnson County Broadcasting Corporation (Johnson), a party intervenor to this proceeding, filed an exception to the Initial Decision and a brief in support thereof, and on January 18, 1974, BR&V and Braverman filed a joint petition for approval of agreement.[1]

[1] The Broadcast Bureau filed comments on the joint petition on January 23, 1974. The Board also has before it a "motion for expedited consideration, motion to dismiss opposition to exceptions to Initial Decision", filed January 7, 1974, by Braverman; an opposition thereto, filed by Johnson on January 10, 1974, and Bureau comments thereon, filed January 14, 1974; a petition for leave to amend, filed November 9, 1973, by BR&V and certified to the Review Board by order of Judge, FCC 74M–92, released January 22, 1973, and the Broadcast Bureau's comments filed on November 16, 1973; and a motion for extension of time in which to file exceptions, filed January 30, 1974, by BR&V.

2. The joint petition seeks approval of an agreement looking toward dismissal of the BR&V application in return for reimbursement of expenses incurred by BR&V in amount of $5,000. BR&V has adequately substantiated expenses incurred in the prosecution of its application in excess of that amount, and petitioners have supplied affidavits describing the initiation and history of the negotiations and setting forth the reason why approval of the agreement would serve the public interest, i.e. it would permit an immediate grant of Braverman's application and expedite the inauguration of the service proposed. Thus, petitioners have complied in all respects with the requirements of Section 1.525 of the Rules.

3. Johnson's exception to the Initial Decision is cast in general terms, i.e. it excepts to the "finding" that a grant of Braverman's application would serve the public interest, and does not comply with the requirements of Section 1.277(a) of the Commission's Rules; for this reason alone it could be dismissed. Moreover, Johnson undertakes to raise for the third time questions previously dealt with by the Commission in its Memorandum Opinion and Order of October 21, 1971, 32 FCC 2d 175, 23 RR 2d 182; and by the Review Board in its Memorandum Opinion and Order, FCC 73R–136, released March 29, 1973, 40 FCC 2d 286, 26 RR 2d 1711. Johnson's contention that the subsequent grant of an application for a new FM broadcast station in Iowa City creates new circumstances which warrant a different result is untenable. The Commission specifically considered each of the questions presented by Johnson in its Memorandum Opinion and Order, *supra*, and the Board refused to reconsider the matter. It would be inappropriate to utilize an application granted after completion of the hearing in this proceeding as a basis for refusing to grant the application of a fully qualified applicant. The exception filed by Johnson is therefore denied; and, in light of the foregoing, the Board will grant the joint petition for approval of agreement, dismiss BR&V's application and grant the application of Braverman. In view of our disposition of this matter, the pending pleadings, as set forth in footnote 1, are moot and will be dismissed.

4. Accordingly, IT IS ORDERED, That the joint petition for approval of agreement looking toward dismissal of application, filed on January 18, 1974, by Burns, Rieke and Voss Associates and Braverman Broadcasting Company, Inc. IS GRANTED; that the agreement IS APPROVED; that the application of Braverman Broadcasting Company, Inc. for a construction permit for a new standard broadcasting station at Iowa City, Iowa (File No. BP–19134) IS GRANTED; and that the application of John F. Burns, Thomas Rieke, and Raymond Voss, d/b as Burns, Rieke and Voss Associates for a new standard broadcasting station at Iowa City, Iowa (File No. BP–17838) IS DISMISSED; and

5. IT IS FURTHER ORDERED, That the motion for expedited consideration and other relief, filed on January 7, 1974, by Braverman; the petition for leave to amend, filed on November 9, 1973, by BR&V; and the motion for extension in time to file exceptions, filed by BR&V on January 30, 1974, ARE DISMISSED; and

6. IT IS FURTHER ORDERED, That: Upon the completion of the proof of performance measurements, the permittee shall, without making any adjustment of the operating parameters, observe the daily variations occurring in the phases and currents of the individual towers as well as the nondirectional and directional fields at the monitoring points, over a period of at least 30 days. The data shall be recorded and plotted in a manner that will permit a determination of the permissible limits of parameter variations for incorporation in the station license. This information shall be submitted 45 days after commencement of authorized program test operation. In order to insure maintenance of the radiated fields within the required tolerance, a properly designed phase monitor shall be installed in the transmitter room, and shall be continuously available as a means of correctly indicating the relative phase and magnitude of the currents in the several elements of the directional system to demonstrate that the array is maintained during day-to-day operation within the maximum expected operating values of radiation.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, *Member, Review Board.*

F.CC. 73D-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JOHN F. BURNS, THOMAS RIEKE, AND RAYMOND VOSS, D.B.A., BURNS, RIEKE & VOSS ASSOCIATES, IOWA CITY, IOWA	Docket No. 19596 File No. BP-17838
BRAVERMAN BROADCASTING CO., INC., IOWA CITY, IOWA For Construction Permits	Docket No. 19597 File No. BP-19134

APPEARANCES

Roy F. Perkins, Jr., on behalf of John F. Burns, Thomas Rieke, and Raymond Voss, d/b as Burns, Rieke and Voss Associates; *Robert W. Healy*, on behalf of Braverman Broadcasting Company, Inc.; *Robert A. Beizer* and *John C. Quale*, on behalf of Johnson County Broadcasting Corporation; and *Theodore D. Kramer* and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FREDERICK W. DENNISTON

(Issued November 21, 1973; Released November 29, 1973)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order (FCC 72-858) released October 4, 1972, the Commission designated for hearing the mutually exclusive applications of John F. Burns, Thomas Rieke, and Raymond Voss, d/b as Burns, Rieke and Voss Associates (BRV) and Braverman Broadcasting Company, Inc. (Braverman) for a new standard broadcast station in Iowa City, Iowa, on the following issues:

"1. To determine with respect to the application of Burns, Rieke and Voss Associates:

"(a) Whether the applicant partnership and its financial contributors, Raymond Voss,[1] Thomas M. Nereim, and Robert B. McDowell, possess adequate current assets to finance the proposed station;

"(b) Whether all the contributors are willing to endorse the note as required by the Hawkeye State Bank; and

"(c) Whether in light of the evidence adduced pursuant to (a) and (b), above, the applicant is financially qualified.

[1] As will hereafter appear, Raymond Voss is a partner but will not otherwise be a financial contributor; on the other hand, John F. Burns, also a partner, will lend $6,000.00 to Voss to allow the latter to meet his commitment. The reason for designating Voss as a financial contributor is thus not apparent but in the light of the findings herein, this is immaterial.

"2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

"3. To determine, in light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted."

2. The Commission ordered that in the event of a grant of either application, the construction permit should contain a condition with respect to radiation patterns, hereinafter stated.

3. By Order, FCC 72M–1441, released November 21, 1972, a petition to intervene filed by Johnson County Broadcasting Corporation (Johnson) was granted and Johnson was made a party to this proceeding. Johnson filed a "Statement in Lieu of Proposed Findings of Fact" indicating it would not participate actively unless its then pending petition to enlarge issues was granted. That petition, however, was denied by Order released March 29, 1973, FCC 73R–136.

4. Subsequent to designation, interlocutory pleadings were filed, all of which have been disposed of. See Review Board Orders released March 29, 1973 (FCC 73R–136); April 6, 1973 (FCC 73R–145); and June 21, 1973 (FCC 73R–229). A request for reconsideration of the original designation order herein and a related petition for leave to amend was dealt with by the Commission by Order released July 9, 1973 (FCC 73–714), 41 FCC 2d 851, which remanded the petition for leave to amend to the Administrative Law Judge, who granted the petition by Order released August 24, 1973, FCC 73M–974.[2]

5. A prehearing conference was held on October 31, 1972 and hearing sessions were held in Washington, D.C. on December 18 and 19, 1972. The record was closed by Order (FCC 73M–202) released February 14, 1973. For purposes of formally ruling on a motion made in the course of the hearing, the record was reopened and reclosed by Order released February 21, 1973, FCC 73M–235. Pursuant to the Review Board Order of June 21, 1973, the record was reopened by Order released June 28, 1973 (FCC 73M–765), a petition for leave to amend to clarify site coordinates was filed by Braverman July 16, 1973, and was granted by Order released October 15, 1973 (FCC 73M–1183) when the record again was closed.

EVIDENTIARY RULINGS

6. In response to the financial issues specified against Voss and the two non-partner financial contributors, certain exhibits were tendered by BRV at the hearing but were rejected by ruling of the Presiding Judge. In the BRV proposed findings, the exhibits are treated as if received without taking specific exception to those rulings. In relying on the rejected exhibits, moreover, by footnotes (Nos. 7, 8 and 9) BRV cites certain Review Board decisions and concludes the footnotes with the statement that each exhibit "is received in evidence." In the event this was intended as an exception to the rulings this novel and deficient method of treatment will nevertheless be dealt with as if proper exceptions to the evidentiary rulings had been taken.

[2] By pleading filed September 11, 1973, the Broadcast Bureau petitioned to reopen the record and to enlarge issues against BRV. That petition is still pending.

7. *Robert B. McDowell, BRV Ex. 2.* While the procedures adopted required the prior distribution of written testimony, BRV distributed only a brief statement by McDowell (BRV Ex. No. 1) which did not deal with financial issues. At the hearing, counsel for BRV requested notice be taken of a financial amendment [3] which had contained a "Summary Financial Statement" of McDowell's which was identified herein as BRV Ex. 2. That statement, however, does not purport to be an actual statement of assets and liabilities, but merely a listing of items described as assets "in excess of" stated even-dollar amounts and of items described as liabilities "not in excess of" stated even-dollar amounts. The major items of assets were real estate but no appraisals or justification for the amounts claimed were offered. At the hearing, McDowell supplemented the Summary Statement with the contention that he was anticipating sales of certain of the real estate from which he expected to realize $9,000.00 in cash. No copies of sales agreements or other corroboration was offered and the exhibit was thereupon rejected. It is noted, moreover, that the exhibit thus rejected is substantially the same as that in the original application which the Commission had found inadequate.

8. *Thomas M. Nereim.* The designation order herein specified a financial issue against Nereim, one of the principal financial backers of the BRV proposal. As described elsewhere (see Order released February 13, 1973, FCC 73M–197) notwithstanding the specification of that issue and the request of Braverman and the Bureau for production of Nereim for cross-examination, BRV withdrew Nereim's previously distributed testimony [4] and failed to produce him as a witness on the ground they "did not need to present him as a witness." In lieu thereof, counsel for BRV sought to introduce through another witness copies of a letter written by Nereim to the partnership (BRV Ex. No. 8) and from the Hawkeye State Bank to Nereim (BRV Ex. 9). Both exhibits were rejected.

9. In its footnote form of appeal, BRV cites *Jay Sadow*, 39 FCC 2d 808, released February 23, 1973, FCC 73R–77, and *Central Westmoreland Broadcasting Co.*, 40 FCC 2d 21, released March 20, 1973, FCC 73R–113. Under the guise of a Reply to Proposed Findings, BRV supplements these citations by reference to *Beamon Advertising, Inc.*, 1 FCC 2d 28, and *Romac Baton Rouge Corp.*, 7 FCC 2d 468. These cases are inapposite. In *Beamon* the disputed bank letter was offered by a witness who had negotiated the loan in question, and the *Romac Baton Rouge* case rejected the argument that an actual loan agreement was required in addition to a commitment. While *Central Westmoreland* is authority for the proposition that bank commitment letters are traditionally accepted without requiring bank officials to testify, there was not, as here, the failure to produce a requisite witness against whom a specific financial issue had been directed. Finally, in *Jay Sadow*, the issue was one of reconciling statements in two separate bank letters.

10. The rulings rejecting the foregoing exhibits are reaffirmed.

[3] Approved by Order released December 15, 1972 (FCC 72M–1553).
[4] Such testimony did not, however, address itself to the financial issue.

FINDINGS OF FACT

The Applicants

11. Burns, Rieke and Voss is a partnership made up of John F. Burns, Thomas G. Rieke and Raymond D. Voss.

12. John F. Burns, an electrical engineer, is a resident of Silver Spring, Maryland, where he has been employed for the past nine and one-half years by the Applied Physics Laboratory. Mr. Burns will be active in the construction of the proposed station and its placement on the air, but thereafter will participate in management only occasionally, but at least once a year when he will personally visit Iowa City. Mr. Burns holds no interests in mass communications media except 90 shares of American Telephone and Telegraph Company stock and the unknown extent to which the retirement fund of the Laboratory or the endowments of Johns Hopkins University which operates it may contain such interests in their portfolios. For purposes of this proceeding, accordingly, Burns has no significant interests in any other form of mass communications media.

13. Thomas G. Rieke is a resident of Ann Arbor, Michigan, where he is employed as Assistant Director of Information Services by the University of Michigan.

14. Rieke lived in Iowa City from 1961 to 1966 and while a student at the University of Iowa at Iowa City, where his major course was journalism, he worked actively with Station WSUI licensed to the University in various capacities from 1962 to 1966, and also worked as news reporter, covering campus and off-campus news. Beginning in 1963 he became a paid employee of WSUI which was operated by a paid, professional staff. He also announced classical music over Station KSUI(FM) also licensed to the University. He performed various announcing and programming functions at both stations until his graduation from the University in 1966 with a major in English creative writing. Thereafter he worked for several newspapers in Michigan, and prepared and announced newscasts over Station WPAG in Ann Arbor for a brief period in 1967 when he became an Assistant Producer of Station WUOM(FM) licensed to the University of Michigan. Rieke was subsequently promoted successively to Producer, Radio–TV News Editor, and Assistant Director of Information Services. He has been involved in civic activities in Ann Arbor.

15. In the event of a grant of the BRV application, Rieke will become its full-time Program Director and will establish his permanent residence in Iowa City where he intends to participate in civic activities. He owns 35 shares (less than 1%) of stock of Teleprompter and is an employee of the University which may include communication stocks in its endowment portfolios. It is concluded that Rieke owns no significant interests in mass communications media.

16. Raymond D. Voss is now employed in Minneapolis, Minnesota and lives in Circle Pines, Minnesota. He is a graduate of the University of Iowa with a degree in Speech-Drama, with a major in radio-television-film. In the event of a grant of the BRV application, Voss will become full-time General Manager and will establish permanent

residence in Iowa City. He owns no other mass communications media interests. While at Cornell University, from 1959 to 1961, Voss worked with Station WVBR(FM), a student station, as announcer, technician, and as News Director. Thereafter, he was also Special Projects Director. During 1960 and 1961 he also worked part time for Educational Station WNED–TV, Buffalo, and became a full-time paid announcer and operator of Station WEIV, Ithaca, in 1961 and 1962. Voss entered the University of Iowa, at Iowa City, in September 1962, where he resided for four years. He became successively, for Station WSUI, a part-time volunteer announcer, a paid part-time announcer, and street reporter. In 1964 he became a news stringer at Iowa City for Stations KCRG and KCRG–TV of Cedar Rapids, becoming a full-time news announcer and reporter for those stations in 1965. In December 1966 Voss moved to Des Moines and joined the news staff of Stations WHO–AM and TV, and went to Station KSTP–TV, in Minneapolis in April 1968. Since September 1970, he has been with Northwestern Bell Telephone Company. Voss began planning for what became the BRV application here involved, in July 1965 and did preliminary work while residing in Iowa City.

17. The BRV partnership agreement of March 1, 1966, provides for the three partners to contribute to and share in the profits or losses on an equal basis. It was also agreed to incorporate when required by the Federal Communications Commission or "when deemed advisable upon the recommendation of competent legal counsel." By amendment of August 12, 1972, a further provision specifies that, in the event of incorporation the capital stock representing the investment of the partnership shall be owned by the partnership and all stock rights exercised as a block "in accordance with the majority vote of only those partners who are residing in the Iowa City area and who are actively engaged in the day-to-day management of the station operation." While the agreement specifies the corporation would be formed upon advice of counsel, each of the partners indicated an expectation this would be done upon the grant of the application.

18. The question of testimony concerning the corporate aspects was the subject of a post-hearing Order, in response to oral motions of Braverman and the Bureau, which ruled that the comparative evaluations herein must be made with respect to the BRV partnership, the actual applicant, Order released February 21, 1973, FCC 73M–235. BRV does not contest this ruling. See footnote 1, page 2, BRV Proposed Findings.

19. Braverman Broadcasting Company, Inc., is 90% owned by its President, Secretary-Treasurer and Chairman of its Board, A. Kent Braverman of Iowa City, Iowa. He has had extensive experience in broadcasting during his university attendance, in the Armed Forces, and for five years as announcer and sportscaster at St. Louis stations. He is now engaged in the real estate business in Iowa City, where he has had extensive civic activities. Braverman will be General Manager of the proposed station and will devote full time to its operation. The remaining 10% interest in the corporation is held by David Braverman who has had no broadcasting experience and will not be integrated into management.

Issue 1(a)—BRV Financial Issue

20. Despite the financial issue directed to the partnership and to its financial contributors, Raymond Voss, Thomas M. Nereim and Robert B. McDowell, BRV made little effort to clarify the matter. In the prepared testimony distributed in advance of the hearing, pursuant to order, the financial issue was not discussed; at the hearing, counsel for BRV simply offered exhibits presented in the application which the Commission had found inadequate in its designation order, or asked generalized questions.

21. *John F. Burns:* Burns is committed to the partnership for $8,334.00 and has agreed to lend $6,000.00 to $8,000.00 to the partner, Voss. To meet this need for $14,334.00 to $16,334.00, Burns has liquid assets, less current liabilities, of $23,150.00. Part of this needed amount is to be obtained by borrowing against stocks of a total value of $33,200.00, of which $8,000.00 worth is already pledged as security for other notes. While Mr. Burns was unable to indicate how much of his stock is held jointly with his wife, he testified unequivocally that he held sufficient stock in his own name to pledge as security for a loan to meet his commitment to the partnership and to Mr. Voss.

22. It is accordingly found that John F. Burns is financially qualified to meet his obligation of $8,334.00 to the partnership and to lend Mr. Voss $6,000.00 or $8,000.00.

23. *Raymond Voss:* Mr. Voss is obligated to the partnership for $8,333.00 as his one-third contribution. As in the case of other witnesses, evidence as to Voss' financial condition was withheld from the distribution of prepared testimony, counsel offering in lieu thereof the financial statement of Voss in the application. Voss was unprepared to answer any questions concerning the details of that statement. It would appear from that statement that Voss has current assets of $4,373.00 with negligible current liabilities, fixed assets of $30,000.00 are listed and long-term liabilities of $18,016.00. The values of the fixed assets are self-assigned and not justified further.

24. Of the $4,373.00 of current assets, all but $350.00 is clearly liquid and convertible to cash. In addition, Voss has available the $6,000.00 [5] which Burns will lend him. It is accordingly found that Raymond Voss can meet his financial commitment.[6]

25. *Thomas M. Nereim:* Nereim is the principal financial backer of the proposed station. According to the application, of which notice is taken, Nereim is obligated to lend $15,000.00 to BRV and to subscribe an additional $15,000.00 in subscription for stock in the proposed corporation, of which Nereim will become the largest individual stockholder. In addition Nereim will purchase the land for the proposed station for $64,000.00. For that property, Nereim will be required to pay $16,000.00 in cash at the closing of the sale and pay the balance

[5] Burns testified he would lend Voss up to $8,000.00 or as much more as he needs for his share but as the application indicated the loan would be up to $6,000.00 only the latter amount is considered herein.

[6] In view of the findings herein concerning Nereim and McDowell, the Bureau contention that the annual amount of monthly payments for which Voss is liable should be deducted from his assets, leaving him unqualified, need not be discussed. This contention ignores the annual income of Voss from which he would make such payments.

in yearly installments of $5,000.00; he will erect a building on the property costing $20,000.00–$25,000.00, and lease it to BRV. Accordingly, Nereim's immediate cash commitment to the partnership consists of $30,000.00 for stock and loan; $16,000.00 for purchase of land; and $20,000.00 to $25,000.00 for erection of building, or a total of $66,000.00 to $71,000.00.

26. There is no evidence of record that Nereim is capable of meeting his financial commitment. While counsel for BRV distributed proposed testimony prior to the hearing, he announced at the hearing that he would not offer it (Tr. 30) nor did he produce Nereim although requested by counsel for both the Bureau and Braverman. Counsel announced (Tr. 32):

> It is our decision as to whom we wish to present as witnesses and your privilege to call them for cross-examination if we do present them and they have elected not to present Mr. Nereim.

27. It is found therefore that the record does not disclose that Thomas M. Nereim possesses adequate current assets to finance his commitment to the proposed station.[7]

28. *Robert B. McDowell:* McDowell is committed to lend BRV $5,000.00. Notwithstanding the specific financial issue directed against him, no financial evidence on behalf of McDowell was distributed prior to the hearing, and counsel simply sought to introduce substantially the same generalized statement in the original application which the Commission had found inadequate in its designation order. McDowell was only able to supply his own appraisals of properties involved and the expected receipt of cash from anticipated sales. No sales contracts or appraisals were supplied.

29. It is accordingly found that the record does not disclose that McDowell possesses adequate current assets to finance his commitment to the proposed station.

Issue 1(b)—Bank Loan Endorsement

30. Each of the partners of BRV is willing to endorse the expected bank loan, but the record does not disclose whether Nereim or McDowell would do so.

Issue 1(c)—Financial Qualifications of BRV

31. In view of the foregoing, the evidence does not disclose that BRV is financially qualified and its application must be denied.

Issue 2—Comparative Evaluation

32. In view of the failure of BRV to establish that it is financially qualified and the resultant dismissal of its application, the comparative issue is moot.

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[7] It is noted, moreover, that by Petition for Leave to Amend, filed November 9, 1973, but not yet disposed of, BRV seeks permission to amend the application to delete all reference to Mr. Nereim and all of his undertakings.

Issue 3

33. Braverman, having already been found qualified by the designation order, it will be in the public interest to grant its application. The grant will be made subject to the requirement noted in paragraph 9 of the designation order.

CONCLUSION

34. It is concluded that the public interest, convenience and necessity will best be served by the granting of the Braverman application and the denial of the application of Burns, Rieke and Voss Associates.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Braverman Broadcasting Company, Inc. for a construction permit at Iowa City, Iowa (File No. BP–19134) is GRANTED, and the application of John F. Burns, Thomas Rieke, and Raymond Voss, d/b as Burns, Rieke and Voss Associates (File No. BP–17838) is DENIED;

IT IS FURTHER ORDERED, That the construction permit hereby authorized shall contain the following conditions: Upon the completion of the proof of performance measurements, the permittee shall, without making any adjustment of the operating parameters, observe the daily variations occurring in the phases and currents of the individual towers as well as the nondirectional and directional fields at the monitoring points, over a period of at least 30 days. The data shall be recorded and plotted in a manner that will permit a determination of the permissible limits of parameter variations for incorporation in the station license. This information shall be submitted 45 days after commencement of authorized program test operation. In order to insure maintenance of the radiated fields within the required tolerance, a properly designed phase monitor shall be installed in the transmitter room, and shall be continuously available as a means of correctly indicating the relative phase and magnitude of the currents in the several elements of the directional system to demonstrate that the array is maintained during day-to-day operation within the maximum expected operating values of radiation.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON,
Administrative Law Judge.

F.C.C. 74-124

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CABLE TV SERVICE CO., EFFINGHAM, ILL. For Certificate of Compliance	CAC-218 IL118

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION:

1. On April 24, 1972, Cable TV Service Company filed the above-captioned application for a certificate of compliance proposing to add two distant television broadcast signals, WGN-TV (Ind., Channel 9) and WFLD-TV (Ind., Channel 32), both Chicago, Illinois, to its existing cable television system at Effingham, Illinois, located outside of all television markets.[1] Cable presently carries the following television signals:

WTWO (NBC, Channel 2)	Terre Haute, Ind.
WTHI-TV (ABC/CBS, Channel 10)	Do.
WCIA (CBS, Channel 3)	Champaign, Ill.
WAND (ABC, Channel 17)	Decatur, Ill.
WSIU-TV (Educational, Channel 8)	Carbondale, Ill.
WICS (NBC, Channel 20)	Springfield, Ill.
KPLR-TV (Ind., Channel 11)	St. Louis, Mo.
WTVI (ABC, Channel 2)	Do.
KMOX-TV (CBS, Channel 4)	Do.
KSD-TV (NBC, Channel 5)	Do.
KDNL-TV (Independent, Channel 30)	Do.[1]

[1] Cable inadvertently omitted KDNL-TV from its original carriage list, but corrected this omission in a letter filed November 19, 1973.

The proposed carriage additions are consistent with Section 76.57 of the Commission's Rules. Midwest Television, Inc., licensee of Television Broadcast Station WCIA, Champaign, Illinois, filed an "Objection Pursuant to Section 76.17" on June 2, 1972, and Cable has replied.

2. In its objection, Midwest argues that Cable does not need to add the two Chicago stations to stimulate its system's growth. Instead, it is suggested that the microwave expansion engendered by Cable's proposal is a stratagem which will result in the importation of more distant signals into Illinois television markets where carriage of such signals is now prohibited by anti-leapfrogging rules. Thus, Midwest urges that the end result of the Commission's approval of Cable's proposal would be the erosion of the Commission's policies and rules, and audience fragmentation and economic injury to WCIA. Midwest asks

[1] Cable began serving the community (population 11,640) on August 19, 1962; the system had 3,053 subscribers as of December 31, 1972.

that the Commission apply the anti-leapfrogging rules to cable systems located outside all television markets. In its reply, Cable notes that Midwest has conceded that the proposed carriage is consistent with the Rules, and that arguments in favor of applying anti-leapfrogging rules to cable systems outside all markets were rejected by the Commission in its reconsideration of the new cable rules.[2] Cable maintains that Midwest has made no showing that the importation of the stations would actually adversely affect WCIA. Finally, it is urged that the claims concerning microwave growth should be considered in connection with any relevant microwave applications and not in the cable certificating process.

3. We reject Midwest's objections. Its bare allegations of potential economic injury resulting from our approval of Cable's additional signals fall short of the specific showings required to substantiate such claims. *Spectrum Cable System, Inc.*, FCC 73–257, 40 FCC 2d 1019. As to Midwest's arguments regarding the ultimate motives behind the growth of microwave services, or prospective erosion of the anti-leapfrogging rules resulting from such growth, they are speculative. To the extent that pending certificate of compliance or microwave applications reveal conflicts with our rules, we will, of course, give them careful scrutiny in connection with their processing. The view that we should apply the anti-leapfrogging rules to areas outside of all television markets was considered and rejected in the *Reconsideration of Cable Television Report and Order*, and Midwest has not presented any information warranting a reappraisal of that judgment.

In view of the foregoing, we find that a grant of Cable's application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application (CAC–218) filed by Cable TV Service Company on April 24, 1972, IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That "Objection Pursuant to Section 76.17" filed on June 2, 1972, by Midwest Television, Inc., licensee of Television Station WCIA, Champaign, Illinois, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] *Reconsideration of Cable Television Report and Order*, paragraphs 24 and 25, FCC 72–530, 36 FCC 2d 326, 335–36.

F.C.C. 74-142

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF §§ 76.7 AND 76.13, RULES AND REGULATIONS

ORDER

(Adopted February 13, 1974; Released February 19, 1974)

BY THE COMMISSION:

1. The present requirement that petitions, applications and related pleadings filed under Sections 76.7 and 76.13 of the Rules and Regulations be accompanied by an affidavit of service rather than the certificate of service which is customary in Commission practice (see § 1.47 (g)) imposes an unnecessary and useless burden on parties to cable television proceedings. We are therefore amending Sections 76.7 and 76.13 to require a certificate rather than an affidavit of service.

2. These amendments are procedural in nature and relieve an unnecessary burden. The prior notice and effective date provisions of 5 U.S.C. 553 are therefore inapplicable.

3. Authority for these amendments is contained in Sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and (j).

Accordingly, IT IS ORDERED, effective February 27, 1974, That Sections 76.7 and 76.13 of the Rules and Regulations are amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. In § 76.7, Pars (b) & (d) are amended to read as follows:

§ 76.7 *Special relief.*

* * * * * * *

(b) The petition may be submitted informally, by letter, but shall be accompanied by a certificate of service on any cable television system, franchising authority, station licensee, permittee, or applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

* * * * * * *

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. For good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied on.

* * * * * * *

2. In § 76.13, subpars (a) (6), (b) (6) & (c) (4) are amended to read as follows:

§ 76.13

(a) * * *

(6) A certificate of service of the information described in subparagraph (1) of this paragraph on the licensee or permittee of any television broadcast station within whose predicted Grade B contour or specified zone the community of the system is located, in whole or in part, the licensee or permittee of any 100-watt or higher power television translator station licensed to the community of the system, the superintendent of schools in the community of the system, and any local or state educational television authorities;

(b) * * *

(6) A certificate of service of the information described in subparagraph (1) of this paragraph on the parties named in paragraph (a) (6) of this section;

(c) * * *

(4) A certificate of service of the information described in subparagraph (1) of this paragraph on the parties named in paragraph (a) (6) of this section;

* * * * * * *

F.C.C. 74–119

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
C. A. CABLEVISION, INC., CARLSBAD, N. MEX.	CSR–344 NM002
C. A. CABLEVISION, INC., ARTESIA, N. MEX.	CSR–345
Petitions for Special Relief	NM001

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION:

1. On March 29, 1973, C. A. Cablevision, Inc., filed a "Petition for Waiver of Section 76.93" of the Commission's Rules[1] requesting a waiver of its duty to provide network program exclusivity to Station KAVE–TV, Carlsbad, New Mexico, on its cable television system at Carlsbad, New Mexico, and a "Petition for Waiver of Section 76.93" requesting a waiver of its duty to provide network program exclusivity to Station KAVE–TV, Carlsbad, New Mexico, on its cable system at Artesia, New Mexico. On April 30, 1973, John B. Walton, licensee of Station KAVE–TV, Carlsbad, New Mexico filed oppositions to the petitions.

2. Cablevision operates twelve channel systems at Carlsbad and Artesia, and provides the following television signals to its subscribers in both communities:

KNME–TV (Educational)	Albuquerque, N. Mex.
XEJ (Foreign)	Juarez, Mexico
KOB–TV (NBC)	Albuquerque, N. Mex.
KTLA (Independent)	Los Angeles, Calif.
KAVE–TV (ABC)	Carlsbad, N. Mex.
KOAT–TV (ABC)	Albuquerque, N. Mex.
KSWS–TV (NBC)	Roswell, N. Mex.
KHJ–TV (Independent)	Los Angeles, Calif.
KBIM–TV (CBS)	Roswell, N. Mex.
KTTV (Independent)	Los Angeles, Calif.
KCOP (Independent)	Do.

Station KAVE–TV, a CBS affiliate, is licensed to a community located in the Mountain Standard Time Zone and places a predicted Principal Community contour over Artesia, and a predicted Grade A contour

[1] Section 76.93 of the Rules provides in pertinent part that:
(b) * * * (O)n request of a television station licensed to a community in the Mountain Standard Time Zone that is not one of the designated communities in the first 50 major television markets, a cable television system shall refrain from duplicating any network program broadcast by such station on the same day as its broadcast by the station.

over Carlsbad.[2] Station KOAT–TV, also an ABC affiliate, does not place a predicted contour over either community.

3. Cablevision argues that Station KAVE–TV is a satellite of Station KELP–TV, El Paso, Texas, which shares no community of interest with either Carlsbad or Artesia; that Station KAVE–TV is sometimes off the air and its signal is often of inferior quality; and that decreased revenue resulting from subscriber loss due to deletion of Station KOAT–TV's network programming might require discontinuance of local origination programming. In *TV Cable of Elk City*, FCC 70–1320, 26 FCC 2d 848, we required an Elk City, Oklahoma, cable system to provide network program exclusivity to a Sayre, Oklahoma, station which was a satellite of an Amarillo, Texas station. And here—as there—we see no reason to believe that grant of network exclusivity would affect the public since the same programs will be available to viewers in either case. Furthermore, Cablevision has failed to support factually its general claim that KAVE–TV transmits an inconsistent and inferior signal. Indeed, Cablevision has failed to reply to Station KAVE–TV's sworn statement that more than a year prior to requesting network program exclusivity, it rewired its transmission site and more recently has installed a television frequency and modulation monitor to assist in maintaining a signal meeting our broadcast technical standards. Finally, we reject Cablevision's argument that possible revenue reduction may inhibit local origination programming as speculative and without a basis in fact. Thus, it is clear that Cablevision must accede to Station KAVE–TV's request. Because Station KAVE–TV is licensed to a community in the Mountain Standard Time Zone, that is not one of the designated communities in the first 50 television markets, Cablevision must provide same day network program exclusivity.

In view of the foregoing, we find that the grant of the requested waiver of Section 76.93 would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Special Waiver of Section 76.93" filed by C. A. Cablevision, Inc., IS DENIED.

IT IS FURTHER ORDERED, That C. A. Cablevision, Inc., IS DIRECTED TO COMPLY with the requirements of Sections 76.91 and 76.93(b) of the Commission's Rules on its cable television systems at Carlsbad and Artesia, New Mexico, within thirty (30) days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

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[2] Section 76.91 of the Rules provides in pertinent part that:

(a) Any cable television station operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the television station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95.

(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows:

(1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part;

(2) Second, all television broadcast stations within whose Grade A contours the community of the system is located in whole or in part.

F.C.C. 74–138

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF MERRICK DAVIS AND NORMAN C. DAVIS, D.B.A. COLVILLE BROADCASTING CO., LICENSEE OF RADIO STATION KCVL, COLVILLE, WASH.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 12, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated August 29, 1972, issued to Merrick Davis and Norman C. Davis, d/b/a Colville Broadcasting Co., Radio Station KCVL, Colville, Washington, and (2) the licensee's response thereto dated September 29, 1972.

2. The Notice of Apparent Liability in this proceeding was issued for willful or repeated violation of Section 73.87 of the Commission's Rules and failure to operate as set forth in the station authorization, in that the station was operated with power of 266.2 watts from 6:02 a.m. to 7:15 a.m., Pacific Daylight Time, on October 15, 16, 18, and 19, 1971. Station KCVL is licensed for operation on 1270 kilohertz with a power of 1,000 watts daytime only, and in accordance with station license may commence operation with 1,000 watts at 6:15 a.m. PST (7:15 a.m. PDT) in October. The station also has Presunrise Service Authority for operation at 210 watts commencing at 6:00 a.m. local time. The Notice indicated that the licensee was subject to apparent forfeiture liability in the amount of one thousand dollars ($1,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended.

3. In response to the Notice of Apparent Liability, licensee acknowledges the violations and in explanation states, in substance, that the station's consulting engineer set the transmitter for operation at the authorized 210 watts "by installing a high-low switch and then through the use of a fine tuning switch lower[ed] the power until it reached 1.95 amperes." The PSA showing the 210 watt power authorization was posted next to the transmitter. Further the licensee states "as near as we can piece this thing together" the sign-on operator, holding a first-class radiotelephone operator's license, mistook the 210 watts on the PSA for 2.10 amperes.[1] Licensee states that all opera-

[1] The Notice of Violation specified that the antenna current was logged as 2.2 amperes which produced power of 266.2 Watts.

tors have been properly instructed regarding operation at correct presunrise power, and asserts that the forfeiture is excessive in view of the licensee's financial condition and the fact that it added the UPI Audio Network to its Associated Press News wire and purchased new equipment to improve service to the community. Licensee requests remission or reduction of the forfeiture.

4. We find that the licensee violated Section 73.87 of the Commission's Rules and failed to abide by the terms of the station authorization by operating the station with power in excess of that authorized on October 15, 16, 18 and 19, 1971 during the hours 6:02 a.m. to 7:15 a.m., Pacific Daylight Time. Licensees will not be excused for violations because their employees may have erred, since licensees are responsible for acts of their employees. *Eleven Ten Broadcasting Corporation*, 32 FCC 706 (1962). Licensees are expected to make continued efforts to serve the community to which they are licensed and will not be relieved of liability for violations by the fact that they have fulfilled their responsibility to serve their communities. *Esther Blodgett*, 18 FCC 2d 6 (1969). Considering all the circumstances in this case, including the licensee's financial condition, we are not persuaded to remit or mitigate the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That Merrick Davis and Norman C. Davis d/b/a Colville Broadcasting Co., licensee of Radio Station KCVL, Colville, Washington, FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated violation of Section 73.87 of the Commission's Rules and failure to abide by the terms of the station authorization. Payment of the forfeiture may be made by mailing to the Commission a check, or other similar instrument, payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of the forfeiture may be filed within thirty days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74-99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re COMMISSION ON CABLE TELEVISION OF THE STATE OF NEW YORK Petition for Special Relief in the Albany-Schenectady-Troy Market	CSR-342

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 8, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On December 10, 1973, Faith Center, licensee of Station WHCT-TV, Hartford, Connecticut, filed a "Petition for Reconsideration" directed against the Commission's decision in *Commission on Cable Television of the State of New York*, FCC 73-1148, 43 FCC 2d 826.[1] Responses to this petition were filed December 26, 1973, as follows: the Commission on Cable Television of the State of New York (CCT) filed an "Opposition to Petition for Reconsideration"; NewChannels Corporation, operator of a cable television system at Troy, New York, filed an "Opposition of NewChannels Corporation to Petition for Reconsideration"; and Sammons Communications, Inc., owner of cable television systems at Johnstown and Gloversville, New York, filed an "Opposition of Sammons Communications, Inc. to Petition for Reconsideration." Faith Center filed a "Reply to Oppositions to Petitions for Reconsideration" on January 8, 1974.

2. In its cited action, taken at CCT's urging of "unusual circumstances," the Commission granted special relief to allow cable television systems in the "Capital District" (the communities within the Commission's definition of the Albany-Schenectady-Troy television market) to carry two independent television signals (WOR-TV and WPIX) from New York City notwithstanding the leapfrogging restrictions of Section 76.61(b)(2) of the Commission's Rules[2] on

[1] Relevant findings of fact are contained in the cited opinion.

[2] Section 76.61(b)(2) of the Rules provides that,

(b) Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of three independent television stations: *Provided, however,* That in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit. The following priorities are applicable to the additional television signals that may be carried:

(2) *Independent stations.*

(i) For the first and second additional signals, if any, a cable television system may carry the signals of any independent television station: *Provided, however,* That if signals of stations in the first 25 major television markets (see § 76.51(a)) are carried pursuant to this subparagraph, such signals shall be taken from one or

condition that the affected cable television systems "refrain from deleting news and public affairs programs of the New York City stations pursuant to the provisions of Section 76.61(b)(2)(ii)." Faith Center does not object to this result *per se*, but is concerned that the affected cable television systems may elect to carry two New York City signals, and one independent signal from Boston. In order to avert this possibility, Faith Center asks that the Commission's earlier action be reconsidered and modified by adding the following condition:

> That cable television systems in the Albany-Schenectady-Troy, New York, television market which rely upon the waiver relief specified in FCC 73-1178 for carriage of New York, N.Y., independent television stations shall also carry television station WHCT-TV, Hartford, Conn., on a primary basis and to the full extent provided by the Commission's Rules.

Faith Center urges that this overall approach on its part (rather than objections to individual certificate applications) is consistent with the Commission's approach, citing footnote 17 of the earlier action. In support of its request, Faith Center argues that WHCT-TV is the closest independent UHF television station to the Capital District; that its right to carriage was recognized in *Capital District Better TV, Inc.*, 39 FCC 2d 13 (1973), *accord*, *Saratoga Cable TV Co., Inc.*, 39 FCC 2d 611 (1973); that some programs from Boston will still be available during exclusivity periods; and that it would not object if—during periods when it was not broadcasting—cable television systems in the Capital District were to carry another independent UHF station within 200 miles, such as the Boston independents.

3. CCT opposes Faith Center's petition on the ground that the Commission's cited action was intended to avoid imposing signal carriage requirements that would "only serve to deprive viewers in the Capital District of programs * * * which would probably be of greater interest and value to them than [other] programs"; that imposition of the requested condition would impose just such an arbitrary signal carriage rule; and that the Commission's earlier action only allowed carriage of New York City signals in the Capital District—it did not require it—and that cable system operators are free to carry WHCT-TV when they feel it serves the interests of the viewing public.

4. NewChannels opposes Faith Center's petition both on procedural and substantive grounds. Since Faith Center did not participate in the initial proceeding before the Commission, NewChannels argues that the petition for reconsideration is defective to the extent that it does not comply with the procedural requirements of Section

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> both of the two closest such markets, where such signals are available. If a third additional signal may be carried, a system shall carry the signal of any independent UHF television station located within 200 air miles of the reference point for the community of the system (see § 76.53), or, if there is no such station, either the signal of any independent VHF television station located within 200 air miles of the reference point for the community of the system, or the signal of any independent UHF television station.
>
> Note.—It is not contemplated that waiver of the provisions of this subparagraph will be granted.
>
> (ii) Whenever, pursuant to Subpart F of this part, a cable television system is required to delete a television program on a signal carried pursuant to subdivision (i) of this subparagraph or paragraph (c) of this section, or a program on such a signal is primarily of local interest to the distant community (e.g., a local news or public affairs program), such system may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the cable system need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

1.106(b) of the Rules[3] (NewChannels recognizes that its standing as a party was also jeopardized by its failure to participate in the earlier proceeding, and it asks that if the Commission does not conclude that it has demonstrated sufficient interest to permit a formal opposition then, at least, its pleading should be accepted as an informal objection). On the merits, NewChannels claims that WHCT–TV is simply trying to bootstrap itself into a preferred position on Capital District cable systems; that the *Capital District* and *Saratoga* decisions hold only that WHCT–TV may be carried—not that it must be; and that WHCT–TV may still be carried in the area, but that to require such carriage would be inconsistent with the provisions of Section 76.61(b)(2)(i). (footnote 2 above). And Sammons has made essentially the same arguments as NewChannels. (We note that Sammons also did not participate in the earlier proceeding).

5. In its reply, Faith Center urges that no television licensees and only two cable television operators have opposed its petition; that many cable television systems in the Capital District have been awarded Certificates of Compliance which *inter alia*, authorize carriage of WHCT–TV; that on June 15, 1972, it had filed a "Petition for Carriage" on many cable television systems in the area which was dealt with in earlier proceedings and which sufficed to establish its interest in the present proceedings; that neither Sammons nor NewChannels has indicated which station would be carried as their third independent signal, which leaves doubt about the status of WHCT–TV; that the reasonableness of its position is confirmed by the fact that other systems in the market have not objected and are proposing carriage of WHCT–TV; and that its position is consistent with the fact that the Commission was fashioning *ad hoc* relief for the area.

6. On the merits, we do not believe it is necessary to involve ourselves in procedural niceties, and will therefore confine ourselves to the specific issue presented on the merits. We do not believe that Faith Center has made any affirmative showing why it should be entitled to preferential carriage in the Capital District. Consequently, we will affirm our earlier action.[4]

In view of the foregoing, the Commission finds that its action in FCC 73–1148 was consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed December 10, 1973, by Faith Center directed against the Commission's decision in FCC 73–1148 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] Section 1.106(b) of the Rules provides that,

> Except where the Commission has denied an application for review without specifying reasons therefor, any party to the proceeding, or any other person aggrieved or whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which he is aggrieved or his interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

[4] In our earlier action, we expressed the view that our decision was dispositive of leapfrog issues in the Capital District, and that we would not deal with such objections in the certificating process. Likewise, our present action is dispositive of Faith Center's request for preferential carriage in the Capital District. Accordingly, such requests for carriage filed by Faith Center with respect to individual certificate applications will not be dealt with in the certificating process.

F.C.C. 74-147

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMMUNICATIONS SATELLITE CORP. Investigation into Charges, Practices, Classifications, Rates and Regulations	Docket No. 16070

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 15, 1974)

BY THE COMMISSION:

1. We have before us a "Request For Waiver And For Order Governing Procedures" submitted jointly by Communications Satellite Corporation ("Comsat"), the Common Carrier Bureau Trial Staff (Staff), Department of Defense (DOD), and Television Networks. They request that we (a) waive our *ex parte* rules in connection with further proposed negotiations looking toward a recommended settlement of the issues in this case and (b) that we specify certain ground rules to govern such further proposed negotiations.

2. The background for this pleading is that, pursuant to a suggestion made by the Chief of the Common Carrier Bureau in a letter to Comsat dated November 20, 1973, meetings of the parties were held under the aegis of the Bureau Chief to explore the possibility of settlement and the general consensus of the parties from these meetings is that there should be further negotiations looking toward settlement; that such further negotiations should be conducted under the leadership of the Bureau Chief (including his designees); and that the Bureau Chief should be able, in the course of negotiations, to initiate and conduct conversations with individual parties or groups of parties, consistent with the rights of all parties to participate in and comment upon any settlement agreement recommended to the Commission by the Bureau Chief. However, this proceeding is a restricted rulemaking proceeding under our *ex parte* rules (Sec. 1.1207); and the Bureau Chief and his designees are decision-making personnel thereunder (Sec. 1.1209); and they could not, absent waiver of those rules, discuss the merits or outcome of the issues in this case with individual parties or groups of parties. (Sec. 1.1221).

3. The four parties submitting the joint pleading herein were nominated by the other parties to assist in developing ground rules for further negotiations. By this pleading we are specifically requested to waive Section 1.1201 *et seq.* of our *ex parte* rules to the limited extent necessary to permit the parties, under the leadership of the Chief of

the Common Carrier Bureau (or his designees), to proceed to further negotiations subject to the following ground rules:

(a) No position taken by any participant for the purposes of negotiation will be referred to outside the negotiations, either orally or in writing, directly or indirectly, in any subsequent on-the-record conduct of the proceeding; nor will such position otherwise be disclosed to the Administrative Law Judge, the Commissioners, or Commission decision-making personnel not participating in these negotiations;

(b) No statements, written or oral, made in the course of these negotiations will be revealed by the participants to anyone other than in connection with participation in these negotiations; and

(c) Nothing which transpires in the agreed upon course of these negotiations shall be considered to disqualify any decision-making personnel from subsequently advising the Commission on the merits as to the decisions to be reached either on matters discussed during these negotiations or on matters not discussed in such negotiations.

None of the parties filed any objections to this joint motion and we have received no other opposition thereto.

4. We believe that the public interest will be served by going forward with the proposals to continue further efforts to negotiate the settlement of the issues herein and we conclude that a grant of the joint motion will facilitate such efforts. However, in view of the fact that this case already has been in progress for about three years and that there is a need for action in the near future on a pending "Petition For Interim Rate Reduction and For Order to Expedite Hearings" filed by the Trial Staff, we are of the opinion that we should place a time limit on the waiver of our *ex parte* rules for the purpose of these negotiations. In our opinion, it is reasonable to expect that the further negotiations could be completed within 45 days from the release date of the order: accordingly, we shall place that time limit upon our waiver herein of the *ex parte* rules.

5. In view of the foregoing, IT IS ORDERED, That Section 1.1201 *et seq.* of our Rules are waived for a period of 45 days from the release date of this order for the limited purposes set forth above and subject to the conditions specified in paragraph 3 herein.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-151

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of COMMUNICATIONS SATELLITE CORP. For Authority To Construct Four Communications Satellites To Be Used as Part of a Domestic Communications Satellite System of A.T. & T. In the Matter of Petitions of Communications Satellite Corp. and Comsat General Corp. for Substitution of Comsat General as Party in Interest	File Nos. 10-DSS-P (4)-71, 17-DSE-P-73, 18-DSE-P-73

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 15, 1974)

BY THE COMMISSION:

1. The Commission has before it a Petition for Clarification and Modification in Part filed on January 28, 1974 by the Communications Satellite Corporation (Comsat) in which request is made that paragraphs 21 and 26 of our Memorandum Opinion, Order and Authorization (Order) released January 9, 1974 in connection with the above-captioned applications be clarified and modified to the extent necessary to permit Comsat to make cash investments in Comsat General Corporation (Comsat General) of up to $150 million, rather than $100 million, without a further order of the Commission.

2. In support of its petition, Comsat states that the net cash requirements to carry out the AT&T domestic and the Navy/Maritime programs by year end 1975 are estimated to be approximately $200 million and that its letter to the Commission dated November 14, 1973, was not meant to imply that the proposed overall financing of $250 million had to be completed by year end 1975. Comsat further states that the $200 million is primarily for the AT&T domestic and Navy/Maritime satellite programs and that if Comsat General is to participate in an aeronautical satellite program and/or make a significant capital investment in CML Corporation, Comsat will seek further approval from this Commission for any contributions it might wish to make to these requirements.

3. Comsat further states that pursuant to paragraph 24 of our Order it is prepared to transfer approximately $50 million in non-cash assets in addition to $100 million in cash, which leaves approximately $50 million additional which will be required by year end 1975 in order to carry out the AT&T domestic and the Navy/Maritime programs.

4. Comsat states that the $50 million which will be required over the next two years should be available primarily or entirely from internal sources including an estimated $22 million cash return from

Intelsat as a result of the assumed transfer of United States off-shore traffic from Intelsat. In any event, it appears that Comsat should have no difficulty in raising up to $50 million from external sources if the anticipated availability of this amount from internal sources does not materialize.

5. However, we recognize the continued primary obligation of Comsat to maintain its ability to meet its obligations to the global system. Therefore, we shall require that before any investment over $150 million is made by Comsat in Comsat General, ($100 million cash plus some $50 million in non-cash assets) Comsat shall first satisfy the Chief of the Common Carrier Bureau that the incremental investment will not impinge upon Comsat's ability to meet its obligations to the global system. Furthermore, Comsat should show the sources of the sums to be invested, the manner and type of the investment and justify the particular method of investment.

6. It should be noted that in modifying our original Order so as to permit Comsat to invest up to $200 million without further order of this Commission, we are not approving the total capitalization nor the capital structure of either Comsat or Comsat General for rate making purposes. In addition, neither the terms of the original Order nor this order constitutes approval of any transfers or allocations for rate making purposes. As we stated in paragraph 24 of our Order, such approvals can only come after substantive review has been made in Docket No. 16070 or other appropriate proceeding.

7. Under these circumstances, we believe it in the public interest to now authorize the funds anticipated to be required in order that Comsat General will be able to meet its service obligations to the United States Navy and to AT&T without requiring a further Commission Order, provided that such investment is made by July 1, 1976.

8. Accordingly, Comsat's Petition for Clarification and Modification in Part IS GRANTED and IT IS ORDERED, that our Memorandum Opinion, Order and Authorization released January 9, 1974 in connection with the above-captioned filings be modified to the extent required to increase the total capital authorized to be invested by Comsat in Comsat General to $200 million subject to the following conditions:

(a) This authorization applies only to those assets actually transferred to Comsat General prior to July 1, 1976.

(b) All the terms and conditions of our original Order are complied with except to the extent specifically modified by this Order.

(c) Before making any incremental investment in any form beyond the cash investment of $100 million and the non-cash assets which are to be transferred presently, Comsat shall first satisfy the Chief, Common Carrier Bureau that such investment will not impinge upon Comsat's ability to meet its obligations to the global system.

(d) Comsat and Comsat General each file within five (5) days of the release of this Order an undertaking to comply with the terms and conditions of the January 9, 1974 Order, including those terms and conditions contained in paragraphs 21, 23 and 24 therein as modified by this Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

104-026—74——4

F.C.C. 74–149

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re the Amendment of PART 21 OF RULES AND REGULATIONS, APPLICABLE TO DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE TO ALLOW "SIGNALING COMMUNICATIONS" BY SUB-AUDIBLE MEANS OF INFORMATION INTENDED FOR RECEPTION AT MULTIPOINT MOBILE AND/OR FIXED POINTS	Docket No. 19939 RM–2222

NOTICE OF PROPOSED RULEMAKING

(Adopted February 13, 1974; Released February 19, 1974)

BY THE COMMISSION:

1. The Commission has under consideration a petition for rule making in the above-entitled matter, which was submitted on July 3, 1973, by CSA Applications, Inc. (CSA). Also before us are comments filed by Airsignal International, Inc., the National Association of Radiotelephone Systems, Varian Microlinks Division, and a joint comment filed on behalf of seven radio common carriers located in several locations across the country.

CSA'S SUMMARY OF ITS PROPOSAL

2. Using facilities leased from mobile common carriers, CSA, which is a communications system corporation, seeks to offer one-way delivery of a "package" of digital information to a large number of mobile and/or fixed points. The digital information "package" is intended to be received at many hundreds of retail locations in a given metropolitan area by an "extremely low-cost" combination of a receiver and miniature computer designed and developed by CSA. This miniature computer can carry out simple "inquiry and response" functions necessary in ordinary retail transactions such as credit card verification. The system operates in the following manner:

3. CSA's receiver-terminals have the capability of storing vast quantities of data in an "extremely inexpensive" miniature computer/memory. A daily update of new information from a large mainframe computer memory is "broadcast" over the sub-audible portion of the mobile telephone band within a short period of time to thousands of retail sites and then "recorded" in the receiver/terminal memory for later use in a business transaction. When actually used at the retail location, the receiver/terminal can verify information related to the transaction. There is no need for any real-time, interactive access to remote computer facilities by means of two-way communications cir-

cuits; a receiver/terminal at the retail location and a one-way sub-audible circuit is sufficient to provide a retail clerk with access to all the information needed to validate a credit sale.

4. Once the necessary FCC authorization sought in this rule making is obtained, CSA expects mobile telephone carriers will file tariffs for a sub-audible digital service to a multitude of fixed or mobile points.

5. The delivery of CSA's updating data need not take place in "real time" to the receiver/terminal because of the device's storage and computing capabilities. CSA could satisfactorily update its receiver/terminal on an interruptible basis during late night and early morning when the paging service activity is very low.

6. CSA's service can be used without interference to existing mobile telephone or paging services. By use of sub-audible transmission techniques, CSA's proposed service can be operated simultaneously with existing mobile telephone service. In addition, the sub-audible portion of the spectrum can be shared with sub-audible paging. The transmission of digital information can be automatically interrupted whenever the service is required for paging. Transmission would be resumed only when the circuits were again free of any other requirements.

7. Thus, CSA believes that its service, through the use of sub-audible techniques, will tap unused frequency resources represented by the Domestic Public Land Mobile Radio Service. No additional frequency assignments are required.

8. Presently, there is no part of the radio spectrum authorized for omnidirectional, one-way multipoint distribution to mobile and/or fixed points which meet the technical and economic criteria underlying CSA's communications requirements. Since CSA's receiver/terminals are to be used in a retail setting, they must be portable and unencumbered by an extensive antenna wiring system. Sub-audible transmission in the mobile telephone spectrum can be received off air with relative low-cost internal receiving antenna and allow access to many portable receiver/terminal devices simultaneously.

9. CSA submits that its proposed rules amendments of Part 21 will stimulate new interrelated uses of computers and communications and better utilization of existing radio spectrum and equipment.

DETAILS OF CSA'S PROPOSAL

10. CSA intends to contact credit card companies, banks, retail stores or other credit institutions at local, regional or national levels to provide credit card verification service at retail outlets across the country. CSA's clients will provide daily data to CSA's central computing facilities. This data will be processed, formatted and analysed, and then transmitted over carrier provided wirelines to local distribution sites in major metropolitan areas. There the data will be stored on a communications computer. Local distribution will be provided on facilities leased from carriers in the Domestic Public Land Mobile Radio Service. Receiver/terminals will be placed at retail locations. Each of these receiver/terminals will have a preprogrammed memory, updated by a daily transmission on the sub-audible portion of a mobil telephone

base station transmitter, probably during late night or early morning hours, when paging activity is low. By use of key sets, wired to the receiver/terminal, and placed in various locations around the store, retail clerks will be able to determine the status of a credit card.

11. CSA decided on use of Domestic Public Land Mobile Radio Service facilities, rather than other systems, after an analysis of relative merits, which is set out in detail on pages 13 through 19 of the proposal. Basically, as we understand it, CSA found that Domestic Public Land Mobile Radio Service facilities are in existence and can be used quite economically. Wireline telephone service, CSA thinks, would be too costly, since each receiver/terminal would have to be reached independently through a separate communications circuit, whereas radio transmissions can reach multiple receiver/terminals simultaneously. Omnidirectional microwave was also considered, but rejected because such systems are not yet located in enough markets and are not likely to be established for some time. Also, CSA believes that multiple distribution systems would be too expensive due to a need for receiving antennas requiring roof mounting and a cost of $2.50 per ft. for antenna lead to the receiver/terminal. Further, CSA thinks that, even if several retail establishments could share a common antenna, it would still require an expensive internal wiring system to reach the areas where the CSA receiver/terminal would be located. Finally, CSA believes that its proposal requires that there be no wire distribution system from an external antenna to the CSA receiver/terminal because the receiver/terminals should be movable within the retail store and installation of a wiring system would be costly and inconvenient to the retailer.

12. CSA plans to utilize the sub-audible portion of Domestic Public Land Mobile Radio Service channels. These sub-audible techniques are now often used by Radio Common Carriers for one-way paging. Tests were conducted under developmental authorization KGI772 (Station KUA305, licensed to United Telephone Company of Ohio) during the summer and fall of 1972, and although the formal report required of United Telephone Company has not yet been filed, CSA has provided a report that indicates these transmissions cause no harm to normal carrier sub-audible or audible operations. This report is available for inspection in the Commission's offices in Washington, D.C. CSA does not think that there will be frequent use of these channels by the Radio Common Carriers during the hours it will transmit, but says that if there is any calling, its signal can be interrupted if necessary, without harm to the digital message upon resumption. Finally, CSA believes that its proposal will increase effective use of the spectrum, since it can be provided on existing frequencies.

COMMENTS SUBMITTED TO THE COMMISSION ON THE PROPOSAL

13. All comments referred to in paragraph 1 above favored CSA's proposal. Varian-Microlinks Division, however, stated that it believed that multipoint distribution system services and transmissions could be used to feed Domestic Public Land Mobile Radio Service stations clustered in major metropolitan areas, thereby making CSA's proposed

service even more efficient. The National Association of Radiotelephone Systems (NARS) supported the proposal but requested that CSA provide more specific information as to the characteristics and costs of the equipment developed by CSA to place digital information on the sub-audible portion of the mobile carriers transmissions since CSA said that this special transmission equipment would normally be operated by the carriers. NARS recognized that CSA indicated low costs (paragraph 3 above) but thought that CSA should be more exact. Finally, NARS also asked for clarification on whether the transmission equipment mentioned is the mini-communications computer (Radio Station Digital Equipment) or is a separate device.

COMMISSION COMMENTS

14. Since the service proposed by CSA could apparently be accommodated with no increased use of the radio spectrum, we find it is in the public interest to issue this Notice of Proposed Rule Making.

15. The Appendix hereto contains the text of the proposed amendments. Authority for this proposed rule making is contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended. All interested persons are invited to file written comments on these proposed rules on or before March 29, 1974, and reply comments on or before April 10, 1974. In reaching its decision in this matter the Commission may take into account any other relevant information before it in addition to the comments invited by this Notice.

16. In accordance with the provisions of Section 1.419 of the Commission's rules, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–135

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES TO PROVIDE A ONE-HOUR ADVANCEMENT IN THE SIGN-ON TIMES OF DAYTIME AM BROADCAST STATIONS TO RECOUP THE MORNING HOUR LOST BY THE ENACTMENT OF YEAR-AROUND-DAYLIGHT SAVING TIME	Docket No. 19902

ORDER

(Adopted February 6, 1974; Released February 11, 1974)

BY THE COMMISSION:

1. On December 18, 1973, we adopted an Order (FCC 73–1324) defining the pre-sunrise operating privileges of daytime-only AM broadcast stations pending resolution of matters at issue in this proceeding. In general terms, the relief provided in that Order allows daytime stations with no foreign protection problems to "back up" their licensed sign-on times by one hour, using the facilities described in their pre-sunrise service authorizations (PSA's). Stations ineligible for a PSA were, by the blanket provisions of paragraph 7(f) of that Order, allowed to commence operation one hour prior to local sunrise with a power of 50 watts, if in so doing, no violation of existing international agreements would occur.

2. In the Notice of Inquiry and Proposed Rule Making (FCC 73–1323) issued in this proceeding, comments were requested on various related matters, including the status of PSA-holders with specified pre-sunrise powers of less than 50 watts, as well as an undetermined number of technically eligible licensees who have never applied for PSA's—presumably because of the severity of time and/or power restrictions under existing PSA rules. Paragraph 10(b), *Notice*.

3. After the adoption of the December 18 Order, a number of daytimers—including those holding low-power PSA's as well as those eligible therefor—have requested special relief from pre-sunrise power restrictions which, it must be conceded, are unrealistically low in terms of effective community service; e.g., WJKM, Hartsville, Tennessee (3.1 watts); WNWI, Valparaiso, Indiana (10 watts); WAHT, Annville-Cleona, Pennsylvania (0.85 watts); KYMN, Northfield, Minnesota (4.2 watts); KOLM, Rochester, Minnesota (1.15 watts); WGTR, Natick, Massachusetts (1.6 watts); and WAVS, Fort Lauderdale, Florida (2.5 watts). Under existing PSA rules, these restrictions are designed to protect U.S. co-channel dominant stations to the west of

the daytime station. Some of these licensees are attempting to compete in the same market with other daytime stations currently ineligible for a PSA but nonetheless permitted to operate one hour prior to local sunrise with a power of 50 watts pursuant to paragraph 7(f) of the December 18 Order. Since all stations involved in this comparison operate on U.S. clear channels, the argument is made that to hold "eligible" stations to existing PSA power restrictions, while at the same time providing a flat 50-watt pre-sunrise operating power for stations presently ineligible for a PSA, is basically inequitable and should be corrected.

4. Despite the additional nighttime skywave interference which will be inflicted on the U.S. clear channel services by the grant of the relief requested, we have concluded that considerations of basic fairness require that, pending outcome of rule making, *all* daytime stations assigned to U.S. I–A and I–B clear channels (*except* those on U.S.-shared I–B clear channels, where such power would not provide foreign protection) be placed on the same 50-watt footing with respect to pre-sunrise operating power. In reaching this conclusion, we stress that we are in no way prejudging the outcome of rule making or of the specific issues raised in paragraph 10(b) of the *Notice*.

5. Authority for the adoption of this Order is contained in section 6 of PL 93–182 and section 4(i) of the Communications Act of 1934, as amended. Because of the urgent need for the interim adjustments herein ordered and because we interpret PL 93–182 as permitting these adjustments to be made without regard to hearing rights which might otherwise be asserted by affected fulltime stations under section 316 of the Communications Act, we find that compliance with the notice and effective date provisions of the Administrative Procedure Act (5 U.S.C. 553) is not required.

6. Accordingly, IT IS ORDERED, That effective February 20, 1974, and pending further action of the Commission, the Order (FCC 73–1324) adopted December 18, 1973, IS MODIFIED in the following particulars:

(a) *Amend paragraph 7(d) to read as follows:* Class II (secondary) daytimers assigned to U.S. I–A and I–B clear channels and *presently holding* PSA's may achieve the one-hour advancement by *adhering*, throughout the year, to the sign-on times specified in outstanding Commission letters with the pre-sunrise facilities described in their PSA's: *Provided*, That if the authorized pre-sunrise power is *less than 50 watts*, the operating power may be increased to 50 watts during the hour immediately preceding local sunrise *if* no co-channel skywave interference to foreign stations would result (see paragraph 1, *Appendix*); and: *Provided further*, That on or before April 15, 1974, stations availing themselves of the 50-watt option shall give written notice to the Commission setting forth the date such operation commenced, describing the method whereby the power reduction from the licensed value has been achieved (if different from that presently employed for PSA operation), and including calculations to establish that the 50-watt pre-sunrise operation causes no objectionable interference to any foreign station. The PSA mode(s) of operation shall be continued until the standard (non-advanced) sign-on times specified in their station licenses, at which times they shall shift to the daytime facilities authorized therein.

(b) *Add a new paragraph 7(g) to read as follows:* Class II (secondary) daytimers assigned to U.S. I–A and I–B clear channels and *currently eligible* for a PSA but who have *not applied* therefor because the allowable pre-sunrise power would be *less than 50 watts* may, on the effective date of this Order, *commence*

operation one hour prior to local sunrise with a power of *50 watts* into the daytime or critical hours antenna system, as appropriate, *if* no co-channel skywave interference to foreign stations would result (see paragraph 2, *Appendix*), and may continue such mode of operation until the standard (non-advanced) sign-on times specified in their station licenses: *Provided*, That on or before April 15, 1974, stations availing themselves of this privilege shall give written notice to the Commission setting forth the date such operation commenced, describing the method whereby the power reduction has been achieved, and including calculations to establish that the 50-watt pre-sunrise operation causes no objectionable interference to any foreign station; and: *Provided further*, That in no event shall operation under this paragraph commence earlier than *6:00 a.m. local time* or local sunrise at the controlling foreign I–B clear channel station (if any) to the east, *whichever is later*—see paragraph 3, *Appendix*.

(c) *Amend paragraph 8 to read as follows:* IT IS FURTHER ORDERED, That any licensee or permittee eligible for a PSA specifying a pre-sunrise power of *more than 50 watts must apply for and obtain* such PSA before the privileges conferred by this Order shall become operative.

7. IT IS FURTHER ORDERED, That the requests for special relief described in paragraph 3 of this Order ARE GRANTED to the extent indicated, and in all other respects ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

1. The following daytime stations hold PSA's but are precluded from increasing PSA powers because of foreign interference conflicts:

KANN—Ogden, Utah
KBIL—Liberty, Mo.
KCLT—Lockhart, Tex.
KCOM—Comanche, Tex.
KGRI—Henderson, Tex.
KHYM—Gilmer, Tex.
KILR—Estherville, Iowa
KKIM—Albuquerque, N.M.
KLPR—Oklahoma City, Okla.
KORC—Mineral Wells, Tex.
KSTA—Coleman, Tex.
WKBA—Vinton, Va.
WKYE—Bristol, Tenn.
WLUX—Baton Rouge, La.
WSER—Elkton, Md.
WTYN—Tryon, N.C.
WXVA—Charleston, W. Va.
WYNA—Raleigh, N.C.
WYNX—Smyrna, Ga.

2. The following daytime stations are eligible for PSA's under section 73.99 of the rules but are precluded from 50-watt PSA operation because of foreign interference conflicts:

KGGH—Houston, Tex.
(new)—McComb, Miss.
WMAG—Forest, Miss.
WXTN—Lexington, Miss.

3. The following daytime stations are eligible for PSA's under section 73.99 of the rules but with sign-on times later than 6:00 a.m. local time because of their geographic relationship to foreign I–B clear channel stations:

KMLO—Vista, Cal.
KNBA—Vallejo, Cal.
KNCR—Fortuna, Cal.
WKDR—Plattsburgh, N.Y.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA, INC.
Concerning the Fairness Doctrine Re:
Station WNET, New York, N.Y.

FEBRUARY 14, 1973.

ACCURACY IN MEDIA, INC.,
1232 Pennsylvania Building,
425 13th Street, NW.,
Washington, D.C. 20004

GENTLEMEN: This is in response to your letter of complaint, dated January 17, 1973, against Television Station WNET, New York, New York, alleging "violation of the fairness doctrine" in its January 2, 1973 broadcast of the program "Behind the Lines."

You state that the program in question "was mainly devoted to reactions to the speech by Clay T. Whitehead on the responsibility of broadcast licensee for the material they broadcast regardless of source," and presented "several persons * * * reacting to Mr. Whitehead's statement, some pro and some con." While you state that you have "no objection to this part of the program," you cite the following concluding statement by Mr. Carey Winfrey, "an employee of WNET," as engendering particular fairness doctrine obligations:

> Before his landslide election, Richard Nixon called for a truce between his administration and the press. That peace, too, now seems to have gotten out of hand. Once again the President is sending out surrogates to discredit the press. In the latest instance, Mr. Clay Whitehead has apparently borrowed Mr. Agnew's speechwriter to accuse the networks of elitist gossip, of sensationalism insead of sense, of ideological plugola. And like Mr. Agnew before him, he gives no specifics, names no names or instances. Also like his predecessor, he ties his criticism to the threat of license revocation.
>
> There is no longer much question that shackling the American press is a major goal of the Nixon Administration. Beyond the parade of officials called out to denounce it, Mr. Nixon himself remains disdainfully aloof from the press. He has given fewer press conferences than any president in recent history. He has approved crippling increases in magazine postal rates.
>
> He opposes federal legislation to protect newsmen from revealing sources of confidential information in courts of law. He employs news black-outs to curb criticism of his incursions and massive retaliations. He has vetoed long range funding for public television. He has imposed prior restraint upon a newspaper for the first time in the nation's history. And, in our view at least, he continually confuses the press' proper adversary role with something he calls Eastern Liberal bias.
>
> We were reminded last week of something another president said not so long ago. It was during the 1948 campaign and Harry Truman was taking a beating from the editorialists, pundits and columnists. Asked about that he said, "Whenever the press quits abusing me, I know I'm in the wrong pew." Apparently Mr. Nixon sees things a bit differently. Until next week, good night.

You assert that this "editorial-type" statement by Mr. Winfrey treated the following issues of public importance: "1. The President is sending out surrogates to discredit the press [and] Mr. Whitehead was one of these"; "2. Shackling the American press is a major goal of the Nixon administration"; and "3. President Nixon imposes news blackouts to curb criticism of his actions." You state that "one could cite other controversial statements in the WNET editorial by Mr. Winfrey, but we consider these accusations * * * the most serious," and that these "issues" were not discussed anywhere in the program except in Mr. Winfrey's statement.

You further state that on January 3, 1973 you wrote to WNET, "asking for the right to reply to the statement by Mr. Winfrey [and] pointing out that the station had an obligation to air contrasting points of view." The copy of his letter which you have submitted indicates that you referred to Mr. Winfrey's remarks as "an exercise in the use of the editorial privilege," and also requested "a transcript of the editorial statement."

In its response to your request, dated January 11, 1973 (a copy of which was enclosed with your complaint), WNET stated that Mr. Winfrey was the "Producer of WNET's 'Behind the Lines' series," and that his concluding statement was not an editorial. The response continued:

> Editorials, or statements by the management of a broadcast licensee in their official capacity, are prohibited by the Communications Act with respect to noncommercial, educational stations. In compliance with this proscription, WNET has assiduously followed a policy of refraining from airing the official views of its management, i.e., officers and trustees. On the other hand, we are very proud of the fact that our facilities have been continually available to responsible spokesmen for contrasting views, including the views of our own production employees such as Mr. Winfrey, who has expressed his personal opinions on several occasions.

WNET further stated to you that "in addition to Mr. Whitehead's speech, other spokesmen who support the Administration's Communications proposal were afforded significant air time, including Mr. Don DeGroot, Manager of WWJ–TV, Detroit"; that "the companion episode to the program * * * consisted of an interview of Mr. Whitehead (after he had screened the previous week's program) and his further explanation of the Administration's plan and reaction to opposition engendered by the proposal"; and that "In view of our our balanced coverage of the Administration's recent broadcast proposal and related matters, your request for time is respectfully denied." The station also enclosed a copy of the above-quoted remarks by Mr. Winfrey which you in turn enclosed with your complaint, such copy being the form of a WNET "Press Release" prefaced as follows:

> The following are producer Carey Winfrey's remarks at the close of "The Whitehead Watch" segment of the BEHIND THE LINES program that airs nationally tonight * * * over the Public Broadcasting Service. "The Whitehead Watch" examines the implications of proposed legislation that was recently announced by Clay T. Whitehead, director of the White House Office of Telecommunications Policy, that would make individual television stations liable, under penalty of losing their licenses, for all the network programming they broadcast including news reports.

In connection with this response, your complaint states that while "the body of the [January 2] program, as well as the follow-up on January 9, afforded time to Mr. Whitehead and to one person who supported his proposals * * *, none of these statements dealt with the important controversial issues that were included in the Winfrey editorial." You also state that "Mr. Winfrey's statement was clearly an editorial, though not labeled as such * * *," and that WNET's response to you raises a question as to whether "the proscription against editorializing by stations such as WNET [can] be evaded by the airing of views which are labeled the personal views of the employee, not of the management." In this regard, you further submit that "the fact that WNET reproduced the Winfrey statement and issued it as a press release certainly suggests that Mr. Winfrey was saying things that were a reflection of the views of the management of WNET."

The fairness doctrine obligates a broadcaster presenting one side of a controversial issue of public importance to afford reasonable opportunity in his overall programming for the presentation of contrasting views. The Commission has further defined this obligation as follows:

> * * * the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming * * * *Applicability of the fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598, 599 (1964).

Both the Commission and the courts have held that on a complaint under the fairness doctrine, the burden is on the complainant to specify the particular issue involved and substantiate its controversiality and public importance, and also to show that particular broadcast material has presented one side of that issue in a cognizable fashion and that the licensee has not afforded reasonable opportunity in his overall programming for the presentation of contrasting views. See *Allen C. Phelps*, 21 FCC 2d 323 (D.C. Cir. 1971). The Commission's preliminary review of such complaints is confined to a determination as to whether the complainant has set forth sufficient information and argument in accordance with these requirements to establish a *prima facie* case of noncompliance on the part of the licensee.

Your complaint cites three statements contained in Mr. Winfrey's closing remarks as having presented three distinct controversial issues of public importance which, in your view, should be considered as separate from the broadcast of Mr. Whitehead's speech and the rest of the program's "pro-con" discussion of the Administration's regulatory proposal and therefore as subject to separate fairness doctrine obligations. At the outset, it should be noted that the fairness doctrine is not ordinarily applicable on such a statement-by-statement basis. As the Commission stated in *National Broadcasting Company, Inc.* (AOPA complaint), 25 FCC 2d 735 (1970):

> Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or inference from statements or presentations,

could be made the subject of a separate and distinct fairness requirement the doctrine would be unworkable. More important, * * * such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism. We would become an integral part of broadcast journalism, passing on thousands of complaints that some statement, or inference to be drawn from a statement, on a newscast or other news show had not been offset by a countering presentation. A policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide-open."

In this regard, implicit in Station WNET's response to your letter is a judgment that Mr. Winfrey's remarks were directed primarily to the subject of "the Administration's recent broadcast proposal and related matters" and presented a contrasting viewpoint with reference to Mr. Whitehead's speech and to what Mr. Winfrey termed as "accusations" of network "elitist gossip, * * * sensationalism instead of sense, * * * ideological plugola" and the "threat of license revocation" contained therein. Although you summarily claim that certain of Mr. Winfrey's statements raised separate or independent issues not discussed elsewhere in the January 2 program or in the follow-up program of January 9, you have submitted no information or argument to support a conclusion that this judgment on the part of the station is unreasonable or that the above-stated Commission policy should not be applicable to the facts and circumstances presented here.

However, assuming *arguendo* that Mr. Winfrey's concluding remarks were shown to have presented one side of a separate issue as to alleged attempts by the Nixon administration to "shackle" or "discredit" the press and to have done so in a manner cognizable under the fairness doctrine, your complaint has not set forth any reasonable basis for a claim that Station WNET has not afforded reasonable opportunity for the presentation of contrasting views on such issue in its overall programming. That such contrasting views may not have been broadcast in the course of the two "Behind the Lines—Whitehead Watch" programs of January 2 and January 9 does not in and of itself indicate that the reasonable opportunity contemplated by the fairness doctrine has not been afforded in the station's other programming. As the Commission has stated:

> * * * it should be remembered that there is no mechanical requirement or formula for achieving fairness. The broadcaster need not balance editorial for editorial or viewpoint for viewpoint. Moreover, there is no requirement that a licensee achieve a balance of opposing views within a single broadcast or even that he present opposing views on the same series of programs * * * What is required is that the broadcaster take affirmative steps to afford a reasonable opportunity for presenting viewpoints on controversial issues of public importance in the station's overall programming. *Wilber E. Schonck*, 19 FCC 2d 840, 841 (1969).

Similarly, the fact that the station refused your request for reply time does not evidence noncompliance with fairness obligations since the doctrine is designed to assure the right of the public to be informed, rather than the interest of any individual or group in having

its own particular views broadcast. Thus, before the Commission could pursue appropriate action with reference to the allegations contained in your complaint, it would have to receive specific information setting forth reasonable grounds for a conclusion that the station's overall programming has not afforded a reasonable opportunity for the presentation of contrasting views on the issue or issues which you have cited as being discussed by the remarks in question. As stated in *Allen C. Phelps*, 21 FCC 2d 12 (1969):

> The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings of transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time. *Id.* at 13.

Your complaint also presents a question as to whether Mr. Winfrey's above-quoted remarks constituted "editorializing" by Station WNET contrary to the provisions of Section 399 of the Communications Act of 1934, as amended by the Public Broadcasting Act of 1967 (Public Law 90–129, approved November 7, 1967, 81 Stat. 368). That section provides that "No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidates for political office."

In construing and applying Section 399, the Commission must necessarily be guided by the history and policy underlying the legislation which added that Section to the Communications Act. That legislative history indicates that Congress envisioned the role of noncommercial educational broadcasting as "a vital public affairs medium—bringing in depth many aspects of community and political life, * * * a means of examining and solving the social and economic problems of American life today." (S. Rep. No. 91–167, 91st Cong., 1st Sess., p. 7 (1969); see also H. Rep. No. 572, 90th Cong., 1st Sess., p. 10 (1967)). With respect to Section 399 of the Act, the House Committee on Interstate and Foreign Commerce reported its understanding that no noncommercial educational station editorializes and stated that the provision was inserted "out of an abundance of caution," adding further, "It should be emphasized that this section is not intended to preclude balanced, fair and objective presentations of controversial issues by noncommercial stations." (H. Rep. No. 572, 90th Cong., 1st Sess., p. 20). The managers on the part of the Senate in conference accepted the provision "* * * when it was explained that the prohibition against editorializing was limited to providing that no noncommercial educational station may broadcast editorials *representing the opinion of the management of such station*," and also emphasized that such prohibition was "not intended to preclude balanced, fair and objective presentations of controversial issues by noncommercial educational broadcast stations." (113 Cong. Rec. 15414 (1967) (Emphasis added)).

In light of this legislative history and policy, the Bureau believes that Section 399 should be interpreted as proscribing programs commonly recognized as editorializing, and that although the use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensees' own views on public issues is therefore not to be permitted, such prohibition should not be construed to inhibit any other presentations on controversial issues of public importance. Such presentations are to be encouraged, subject of course to the obligations of the fairness doctrine. See *In re Complaint of Accuracy In Media, Inc. on behalf of Marilyn Desaulniers Concerning Fairness Doctrine Re Public Broadcasting Service*, 43 FCC 2d 851, 854–55 (1973). It is the Bureau's further opinion that Section 399 would not appear to prohibit the expression of views on public issues by employees of a noncommercial educational broadcast station in their capacity as individuals and on the same basis as other advocates, provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management. To so interpret Section 399 as to prevent any and all expression of employee views would in our judgment require an unnecessarily broad construction of its proscription of editorializing by licensees, contrary to both the Congressional policy of fostering "a vital public affairs medium" in public broadcasting and the specific prohibition against Commission censorship contained in Section 326 of the Communications Act. However, where particular facts and circumstances established that a licensee or its management were engaging in "editorializing" by presenting its own views on public issues in the guise of employee personal opinion, the Commission would take appropriate corrective action.

Based on the information presented by your complaint and the above-stated principles, the Commission cannot conclude that Mr. Winfrey's remarks constituted editorializing by the licensee of Station WNET in violation of Section 399 of the Act. The station's response to your letter has stated that Mr. Winfrey was the "producer" of the program in question and is not an officer or trustee of the licensee, and that his remarks were an expression of his own personal opinion and not necessarily the views of the licensee or its management. Although your complaint summarily characterizes Mr. Winfrey's remarks as an "editorial-type" statement, you have submitted no information indicating that such remarks were either represented or intended as a presentation of the official views of the licensee. In this regard, the WNET pre-broadcast press release only stated that the remarks were those of "producer Carey Winfrey * * * at the close of 'The Whitehead Watch' segment of the BEHIND THE LINES program that airs nationally tonight * * * over the Public Broadcasting Service," and did not in any way identify or represent Mr. Winfrey's statement as the opinion of the licensee or its management. Upon these facts and circumstances, no violation of Section 399 is evident.

For the foregoing reasons, no further Commission action with respect to your complaint is warranted at this time. The delay in responding, due to the increased volume of work with which our staff is confronted, is regretted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 74–125

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
FIRST ILLINOIS CABLE TV, INC., SPRINGFIELD, ILL.	CAC–167 IL091
FIRST ILLINOIS CABLE TV, INC., LELAND GROVE, ILL.	CAC–168 IL111
FIRST ILLINOIS CABLE TV, INC., SOUTHERN VIEW, ILL.	CAC–169 IL112
FIRST ILLINOIS CABLE TV, INC., JEROME, ILL.	CAC–170 IL113
FIRST ILLINOIS CABLE TV, INC., GRANDVIEW, ILL.	CAC–171 IL114
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE DISSENTING; COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT.

1. First Illinois Cable TV, Inc., which operates cable television systems at the above-referenced communities, has filed the subject applications for certificates of compliance to add Stations KPLR–TV (Ind., Channel 11), St. Louis, Missouri, and WGN–TV (Ind., Channel 9), Chicago, Illinois. All of the communities lie within the Springfield-Champaign-Decatur-Jacksonville market (#64). Each system has a 12 channel capacity [1] and is currently providing the following signals to its subscribers:

WCIA (CBS, Channel 3)	Champaign, Ill.
WAND (ABC, Channel 17)	Decatur, Ill.
WICS (NBC, Channel 20)	Springfield, Ill.
KETC–TV (Educational, Channel 9)	St. Louis, Mo.
WILL–TV (Educational, Channel 12)	Urbana, Ill.

2. Timely objections to the applications were filed by Midwest Television, Inc., licensee of Television Broadcast Station WCIA Champaign, Illinois, and Plains Television Corporation, licensee of Television Broadcast Station WICS, Springfield, Illinois. Both parties oppose First Illinois' proposed carriage of WGN–TV. Midwest states, and First Illinois fails to dispute, that the closest top 25 market to Springfield is St. Louis, Missouri (market #11, 86.1 miles), the second closest is Indianapolis-Bloomington, Indiana (market #16, 172.2

[1] First Illinois states that it plans to expand each system to a 26-channel capacity. It will provide the required access cablecasting channels in connection with the addition of the two proposed signals.

miles), and the third closest is Chicago, Illinois (market #3, 177.7 miles). The objecting parties argue that First Illinois must restrict its carriage of distant independent signals from a top 25 market to those that are licensed to either St. Louis or Indianapolis-Bloomington. Midwest notes that leapfrogging of the two closest top 25 markets would deny carriage of two UHF Stations, KDNL–TV, St. Louis, and WURD, Indianapolis. In addition, Midwest asks for assurances that First Illinois will provide it with network program exclusivity, pursuant to Section 76.91 of the Rules, and Plains asks that we delay our determination here until after the Supreme Court decides *United States* v. *Midwest Video Corporation*.[2]

3. A timely reply was filed by First Illinois wherein it requests a waiver of the leapfrog restrictions of Section 76.63 to permit carriage of Station WGN–TV. In support of its waiver request, First Illinois argues that although signals from the Indianapolis-Bloomington market are unavailable either off the air or via microwave, the Chicago signals are available from existing microwave facilities. First Illinois further states that there is a strong community of interest between Springfield, the State capital, and Chicago, the state's largest city. In support of this position, First Illinois notes that approximately 11,900 of Springfield's residents are employed by the state government, and that over 60% of the state's population is in or near Chicago. Because of this, it argues that Chicago provides the "dominant state-wide constituency," and that the programming of local and state-wide events on the Chicago station, which includes the games of Chicago's professional baseball, basketball, and hockey teams, is much more meaningful to Springfield residents than the out-of-state programming from Indianapolis. Furthermore, it argues that the disparity in distances from Springfield to the second and third closest top 25 markets is only 5.5 miles.[3] First Illinois suggests that because of the coincidence of extraordinary circumstances (carriage of a signal of an independent station located in the state's largest city on cable television systems in and around the state's capital) and the relatively small distance involved (5.5 miles), the subject applications should merit a waiver of Section 76.63(a) (as it relates to Section 76.61(b)(2)) of the Rules.

4. We are unpersuaded by First Illinois' argument that the Indianapolis-Bloomington signals are "unavailable". The Commission, in Paragraph 25 of its *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 335 (1972), indicated its intention not to grant leapfrogging waiver requests because of microwave savings, absent compelling circumstances, and First Illinois has not even supported its microwave argument with factual data; however, its other arguments, not based on microwave savings, have convinced us that a grant of the requested waiver would serve the public interest. It appears that the circumstances associated with these applications are closely

[2] Such a delay is unnecessary since the Supreme Court decided this case on June 8, 1972. *United States* v. *Midwest Video Corporation*, 406 U.S. 649 (1972).

[3] Comparable figures for the other subject communities are: Grandview—4.82 miles; Jerome—7.07 miles; Leland—6.42 miles; and Southern View—8.42 miles.

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analogous to those involved in *Commission on Cable Television of the State of New York*, FCC 73–1148, 43 FCC 2d 826 (1973), *recons. denied*, FCC 74–99, — FCC 2d — (1974), and warrant the same result. In particular, we note that both cases involve carriage of distant independent signals from the state's largest city by cable systems situated in and around the state capital, and in both cases we find a special community of interest between the cities in question, especially when the other viewing choices involve out-of-state signals. In the First Illinois cases, we also note the extremely small disparity in the distance between the second and third closest top 25 markets, i.e., a 4.82–8.42 mile range. See *Madison County Cablevision*, FCC 73–934, 42 FCC 2d 969 (1973). Under these unusual circumstances, we believe that a waiver of Section 76.63(a) (as it relates to Section 76.61(b)(2)) of the Rules is appropriate. As to Midwest's request for special assurances of receiving program exclusivity, First Illinois has stated that it has no intention of violating the Commission's Rules regarding exclusivity. We have held that further assurances of such protection are unnecessary. *E.g.*, *Morgan County Tele-Cable, Inc.*, 39 FCC 2d 605 (1973).

In view of the foregoing, the Commission finds that a grant of the subject applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the objection filed May 26, 1972, by Midwest Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the objection filed May 26, 1972, by Plains Television Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–167 through 171) filed April 13, 1972, by First Illinois Cable TV, Inc., ARE GRANTED, and the appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-165

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (WINCHENDON, MASS.; PLYMOUTH AND NEWPORT, N.H.; AND SKOWHEGAN, MAINE)	Docket No. 19540 RM-1791

ORDER TO SHOW CAUSE

(Adopted February 13, 1974; Released February 20, 1974)

BY THE COMMISSION:

1. A Notice of Proposed Rule Making (FCC 62-603, 37 Fed. Reg. 14240) was released in this matter on July 11, 1972. The Notice proposed amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules) as follows:

City	Channel number	
	Present	Proposed
Winchendon, Mass.		249A
Plymouth, N.H.	261A	287
Newport, N.H.	285A	269A
Skowhegan, Maine	286	294

There were voluminous comments by several parties in response to the Notice.

2. The Commission has intensively studied the entire record in the proceeding, but has reached no conclusions with respect to the assignments proposed in the Notice. The key proposal is the request of Lakes Region Broadcasting Corporation for the assignment of Class C Channel 287 to Plymouth, New Hampshire. In order to assign Channel 287 to Plymouth, it will require the modification of the licenses of Station WGHM-FM, Skowhegan, Maine, and Station WCNL-FM, Newport, New Hampshire, by assigning different channels to the respective cities in the FM Table of Assignments. And, final disposition of the Winchendon proposal is connected with our decision on the Plymouth request.

3. Kennebec Valley Broadcasting System, Inc., the licensee of Station WGHM-FM, Skowhegan, has stated that it would not object to a modification to operate on Channel 294 provided the ultimate occupant of Channel 287 at Plymouth is required to reimburse it for the reasonable cost of the shift. We also note that Lakes Region has stated in its comments that it was authorized to state that Eastminster Broad-

casting Corporation, licensee of Station WCNL–FM, Newport, New Hampshire, would not object to a modification of its license by a shift of channels at Newport, provided it received reasonable reimbursement for the change from the party receiving the construction permit on Channel 287 at Plymouth. However, Station WCNL–FM has not directly indicated that it would accept such modification, and therefore it is necessary to issue an Order directed to Station WCNL–FM to show cause why its license on Channel 285A should not be modified to specify operation on Channel 269A.

4. IT IS ORDERED, That, pursuant to Section 316 of the Communications Act of 1934, as amended, Eastminster Broadcasting Corporation, licensee of Station WCNL–FM, Newport, New Hampshire, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 269A instead of Channel 285A if the Commission in this proceeding finds it in the public interest to assign Channel 287 to Plymouth, New Hampshire, and to substitute Channel 269A for Channel 285A at Newport, New Hampshire, this order being made with the understanding that the permittee of Channel 287 at Plymouth, New Hampshire, will pay reasonable reimbursement of expenses incurred in the change of channel of operation of Station WNCL–FM at Newport, New Hampshire.

5. Pursuant to Section 1.87 of the Commission's Rules and Regulations, the licensee of Station WCNL–FM, may, not later than February 28, 1974, request that a hearing be held on the proposed modification. Pursuant to Section 1.87(f), if the right to request a hearing is waived Eastminster Broadcasting Corporation may, not later than March 7, 1974, file a written statement showing with particularity why its license should not be modified or not so modified as proposed in the Order to Show Cause. In this case, the Commission may call on Eastminster Broadcasting Corporation to furnish additional information, designate the matter for hearing, or issue without further proceeding an order modifying the license as provided in the Order to Show Cause. If the right to request a hearing is waived and no written statement is filed by the date referred to above, Eastminster Broadcasting Corporation will be deemed to consent to modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–155

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GENERAL COMMUNICATIONS & ENTERTAINMENT CO., INC., ALBUQUERQUE, N. MEX. For Certificate of Compliance	CAC–109 NM036

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 20, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On July 19, 1973, Spanish International Communications Corporation, licensee of Television Broadcast Station KMEX–TV, Los Angeles, California, filed a petition for reconsideration directed against the Commission's decision in *General Communications and Entertainment Co., Inc.*, FCC 73–632, 41 FCC 2d 501, which authorized the operation of a cable television system at Albuquerque, New Mexico (located in the 81st television market). This petition is opposed by General Communications and Entertainment Company, Inc., proposed operator of the cable television system at Albuquerque, New Mexico, and Spanish International has replied.

2. Spanish International objects to General Communication's carriage of Station XEPM–TV (foreign language), Juarez, Mexico. In its petition, Spanish International asserts that the Commission should prohibit carriage of foreign language programming where domestic foreign-language programming is actually or potentially available to the cable operator either off the air or via microwave. Further, petitioner states that an application is in the process of being prepared for a UHF television station to operate on Channel 23 in Albuquerque, New Mexico, that will provide the same program material to the Albuquerque market as Station XEPM–TV supplies. The economic viability of such stations, it is argued, would be threatened by the carriage of Station XEPM–TV.

3. We previously have considered and rejected similar Spanish International objections in our *Reconsideration of the Cable Television Report and Order*, para. 23, FCC 72–530, 36 FCC 2d 326, 334–35 (1972). Absent a compelling demonstration of special circumstances, we believe that we should not impose "general restrictions on the right of cable systems to distribute the programming of foreign stations." Paragraph 23 of the *Reconsideration, supra*. On an appropriate showing, our concern for the economic viability of local foreign language stations would be reflected. Accord, *Big Valley Cablevision, Inc.*, FCC 73–414, 40 FCC 2d 662, *recons. granted*, FCC 73–1244, — FCC 2d —

(1973); *Sierra Vista CATV Co., Inc.*, FCC 73–1170, 43 FCC 2d 958, n. 3 (1973). The evidence submitted in this proceeding does not meet the evidentiary test enunciated in our prior decision herein and in the *Reconsideration*, *supra*.

In view of the foregoing, the Commission finds that reconsideration of its action in *General Communications and Entertainment Co., Inc.*, FCC 73–632, 41 FCC 2d 501 (1973), would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed July 19, 1973, by Spanish International Communications Corporation, licensee of Television Broadcast Station KMEX–TV, Los Angeles, California, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74-158

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
GREATER MILFORD CABLE ANTENNA TV, INC., MILFORD, MASS.	CAC-1153 MA059
GREATER MILFORD CABLE ANTENNA TV, INC., HOPEDALE, MASS.	CAC-1154 MA060
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 20, 1974)

BY THE COMMISSION:

1. On September 1, 1972, Greater Milford Cable Antenna TV, Inc., filed the above-captioned applications for certificates of compliance to operate new cable television systems at Milford and Hopedale, Massachusetts, communities located in both the Boston-Cambridge-Worcester, Massachusetts television market (#6) and the Providence, Rhode Island-New Bedford, Massachusetts television market (#33).[1] Applicant intends to carry the following television signals:

WGBH-TV (Educational, Channel 2)	Boston, Mass.
WGBX-TV (Educational, Channel 44)	Do.
WBZ-TV (NBC, Channel 4)	Do.
WCVB-TV (ABC, Channel 5)	Do.
WNAC-TV (CBS, Channel 7)	Do.
WSBK-TV (Independent, Channel 38)	Do.
WKBG-TV (Independent, Channel 56)	Cambridge, Mass.
WSMW-TV (Independent, Channel 27)	Worcester, Mass.
WSBE-TV (Educational, Channel 36)	Providence, R.I.
WJAR-TV (NBC, Channel 10)	Do.
WPRI-TV (CBS, Channel 12)	Do.
WTEV (ABC, Channel 6)	Do.

The applications are not opposed, and carriage of these signals is consistent with Section 76.61 of the Commission's Rules; however, Greater Milford seeks a partial waiver of Section 76.251(a)(4) of the Commission's Rules.

2. Greater Milford seeks partial waiver of Section 76.251(a)(4) of the Rules to allow the sharing of its public access studio and production facilities which will be constructed at a location within the city limits of Milford. In support of its request, Greater Milford states that Hopedale is a "bedroom community" of Milford, and that with the ex-

[1] The communities of Milford and Hopedale have populations of 19,352 and 4,992, respectively. Greater Milford will construct a single "system" with a minimum of 24 channels available for the carriage of broadcast and access services. Of these channels, 12 are to be used for television signal carriage, 8 for access cablecasting, and a full FM band.

ception of local schools and one supermarket, Hopedale is totally dependent upon Milford for the majority of its consumer needs and services; that the only local hospital is located within the limits of Milford; and that Milford is approximately five times the size of Hopedale. Greater Milford also notes that the proposed studio in Milford will be located within a 5–10 minute drive or a 30–50 minute walk from almost all of the populated areas of both communities. In all other respects, the access proposal is consistent with the Rules. We acknowledged in paragraph 147 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 197, that smaller communities in major markets "are free to meet their [access] obligations through joint building * * * with cable operations in the larger core areas." We are satisfied that the size and contiguity of these communities justifies the partial waiver sought by Greater Milford. See *Community Television, Inc.*, FCC 73–1208, 43 FCC 2d 1090.

3. The Town of Hopedale and the Town of Milford granted franchises to Greater Milford on February 14, 1972. These franchises need only demonstrate substantial consistency with the provisions of Section 76.31 of the Rules, in accordance with the note following Section 76.13(a)(4). In all respects, save one, the franchises fully comply with Section 76.31 of the Rules. The exception involves the description of the franchise areas to be served by Greater Milford. Both franchises specify the areas in the following manner: "The entire Town of * * * [Milford; Hopedale], Massachusetts, excluding only areas with a density of less than 40 homes or rental units per mile." We have encountered with increasing frequency such "line extension" clauses, requiring a franchisee to serve only those portions of the franchise area having a specified minimum number of potential subscribers. It is unclear whether such franchise provisions are acceptable under our present rules.[2] We recognize that the geographic and/or demographic characteristics of a particular community may justify excluding certain areas from receiving cable service in order to insure the economic viability of the cable system and to avoid the need for higher subscriber fees to offset increased construction costs; however, we are concerned that any such exclusions be equitable, reasonable, and non-discriminatory in nature, and be knowledgeably arrived at by a franchising authority. In addition, we think that persons residing in those areas which will not receive cable service should be given adequate and timely notice of that fact prior to the granting of a franchise so that they may voice

[2] Section 76.31(a)(2) states: "The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter equitably and reasonably extend energized trunk cable to a substantial percentage of its franchise area each year, such percentage to be determined by the franchising authority." Paragraph 180 of the *Cable Television Report and Order*, FCC 72–108, FCC 2d 143, 208, contains a rather broad gloss on this provision, as follows:

> Another matter uniquely within the competence of local authorities is the delineation of franchise areas. *We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community.* [Emphasis added.] A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. No broadcast signals would be authorized under such circumstances. While it is obvious that a franchise cannot build everywhere at once within a designated franchise area, provision must be made that he develop service reasonably and equitably. There are a variety of ways to divide up communities; the matter is one for local judgment.

any objections they may have during the "full public proceeding affording due process," required by Section 76.31(a)(1) of the Rules. We may soon institute a rule making proceeding looking toward the establishment of guidelines and standards to be followed by local authorities when delineating service areas which exclude significant portions of a community. In the meantime, we will process pending certificate applications that contain line extension clauses that appear reasonable on their face. Judged by this standard, the Greater Milford provisions are acceptable at this time. We therefore conclude that the two franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the above-captioned applications until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications and partial waiver of Section 76.251 of the Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance for a Proposed Television System," filed September 1, 1972, and the "Amendment to Certificate of Compliance Application and Request for Waiver" filed February 23, 1973, by Greater Milford Cable Antenna TV, Inc., ARE GRANTED, and appropriate certificates of compliance (CAC–1153 and 1154) will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HYMEN LAKE, PINE CASTLE-SKY LAKE, FLA. For Construction Permit	Docket No. 19432 File No. BP-18491

ORDER

(Adopted February 13, 1974; Released February 14, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. The Review Board having under consideration the Initial Decision herein, the exceptions and briefs, and the request for oral argument, filed with respect thereto;

2. IT IS ORDERED, That oral argument before a panel of the Review Board IS SCHEDULED for March 12, 1974, commencing at 10 A.M., in Room 650, 1919 M Street, N.W., Washington, D.C.; that the parties who within five days after release of this Order file written notice of intention to participate in oral argument (Section 1.277(c) of the Rules) shall each be allowed 20 minutes for argument; that counsel for Chief, Broadcast Bureau may reserve part of his time for rebuttal; and that the order of appearance shall be:

Chief, Broadcast Bureau
Hymen Lake

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R-50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JAMES E. REESE, SHREVEPORT, LA.	Docket No. 19507 File No. BP-18318
RUBY JUNE STINNETT DOWD, EXECUTRIX OF THE ESTATE OF ALVIS N. DOWD, DECEASED, D.B.A. NORTH CADDO BROADCASTING CO., VIVIAN, LA.	Docket No. 19508 File No. BP-18369
E. S. STERLING, JOEL E. WHARTON, AND DR. T. J. TALIAFERRO, D.B.A. BOSSIER BROADCASTING CO., BOSSIER CITY, LA.	Docket No. 19509 File No. BP-18507
For Construction Permits	

APPEARANCES

Robert W. Coll and *Jonathan Schochor*, on behalf of James E. Reese; *Gordon R. Malick*, *Robert A. Marmet*, and *Lauren A. Colby*, on behalf of Ruby June Stinnett Dowd; *Julian P. Freret* and *Joel E. Wharton*, on behalf of Bossier Broadcasting Company; and *Robert B. Nelson* and *Walter C. Miller*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 8, 1974; Released February 15, 1974)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER NELSON DISSENTING WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of Ruby June Stinnett Dowd, Executrix of the Estate of Alvis N. Dowd, deceased, d/b/a North Caddo Broadcasting Company (Dowd),[1] E. S. Sterling, Joel E. Wharton and Dr. T. J. Taliaferro, d/b as Bossier Broadcasting Company (Bossier Broadcasting) and James E. Reese (Reese). Mrs. Dowd seeks authority to change the frequency of her existing standard broadcast facility (Station KNCB, Vivian, Louisiana) from 1600 kHz, 5 kw, Day, to 1300 kHz, 5 kw, Day, while Reese and Bossier Broadcasting are seeking authorizations to construct new standard broadcast stations on 1300 kHz, 500 watts, Day Shreveport, Louisiana, and 1300 kHz, 1 kw, Day, Bossier City, Louisiana, re-

[1] Following the hearing, but prior to the filing date for proposed findings, applicant Alvis N. Dowd died. By Order, FCC 73M-159, released February 5, 1973, his widow, Ruby June Stinnett Dowd, as Executrix, was substituted as applicant herein.

spectively. By Memorandum Opinion and Order, FCC 72–423, released May 22, 1972, the applications were designated for hearing on financial and Suburban Community issues with respect to Bossier Broadcasting; limited financial and Rule 1.65 issues with respect to Reese; and on areas and populations, 307(b) and contingent comparative issues.

2. On April 20, 1973, Administrative Law Judge Frederick W. Denniston released an Initial Decision (FCC 73D–17) proposing grant of the Reese application and denial of the Dowd and Bossier Broadcasting applications. In reaching this result, the Judge predicated the denial of Bossier Broadcasting's application upon its failure to meet its burden of proof under both the specified financial and Suburban Community issues, and because its untimeliness in filing proposed findings, pursuant to direction, constituted waiver of its right to participate further in this proceeding.[2] With regard to the remaining competing applications, the Judge resolved the limited financial issue favorably to Reese, assessed it a comparative demerit on the 1.65 issue and concluded that the Reese application should be granted under the 307(b) issue. He also made findings under the contingent comparative issue favorable to Reese based upon the absence of record evidence regarding Dowd's new owners.[3] This proceeding is now before the Review Board on exceptions filed by the parties.[4] Based on our consideration of the Initial Decision in light of the exceptions and supporting briefs, the arguments of the parties [5] and our examination of the record, we agree with the Presiding Judge's conclusion that the 307(b) issue is dispositive and that the Reese application should be granted. In addition, we agree, generally, that the Judge's findings and conclusions adequately and accurately reflect the record. Accordingly, except as modified herein and in the rulings on exceptions contained in the attached Appendix, those findings and conclusions are adopted. We note, however, that in light of our determination that the 307(b) issue is controlling, we need not and do not reach the contingent comparative issue.[6] Since we are of the opinion that the 307(b) issue is the major

[2] Section 1.263(c) of the Commission's Rules and Regulations provides in pertinent part:

> (c) In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs, or memoranda of law, when directed to do so, may be deemed a waiver of the right to participate further in the proceeding.

Proposed findings were due on January 2, 1973. Bossier Broadcasting filed its proposed findings of fact and conclusions on January 12, 1973. No explanation was furnished for the delay in filing.

[3] Dowd's motion to amend its application to substitute the Executrix of the Estate of Alvis N. Dowd as the applicant states that under terms of the Will of Mr. Dowd, 50% of Station KNCB will be owned by Mrs. Dowd and 50% by the brother of the decedent, Mr. R. S. Dowd.

[4] The exceptions of the Broadcast Bureau and Reese relative to the financial issue against Reese go to the Judge's failure to explicitly state in his conclusion that Reese established its financial qualifications, rather than his favorable resolution of the issue. Accordingly, since the Board believes that the Judge's resolution of this issue is correct, no further discussion of it in the decision is necessary.

[5] Oral argument was held before a panel of the Review Board on October 18, 1973.

[6] Dowd filed an amendment to the instant application on July 20, 1973, to report the filing of an assignment application on July 2, 1973, by Mrs. Dowd, seeking authorization for assignment of the license of Station KNCB from Ruby June Stinnett Dowd, as Executrix, to Ruby June Stinnett Dowd, doing business as North Caddo Broadcasting Company, Vivian, Louisiana. In its petition to amend, Dowd also requested that the record in this case be reopened to allow adduction of comparative evidence regarding Mrs. Dowd. On September 27, 1973, Dowd filed a second petition for leave to amend its application to reflect that the Commission had granted the assignment application effective August 28, 1973. Again, Dowd sought to reopen the record so that it could adduce additional evidence on Mrs. Dowd's comparative qualifications. We will accept both amendments for the purposes of reporting the filing and granting of the assignment application. However, Dowd's request to reopen the record to adduce evidence regarding Mrs. Dowd's comparative qualifications will be denied in light of our ruling on the 307(b) issue.

area of controversy, we shall principally devote our discussion to the reasons why we believe that the Reese application is to be preferred under this issue. Before commencing that analysis, however, we shall briefly discuss the Bossier Broadcasting application to the extent relevant to the ultimate disposition of the case.

BOSSIER BROADCASTING'S APPLICATION

Financial Issue

3. In determining that Bossier Broadcasting failed to meet its burden of proof with respect to the designated issue,[7] the Judge made the following findings of fact. First, with respect to estimated construction and operation costs,[8] he found: (a) that Joel Wharton, a partner of Bossier Broadcasting, admitted under questioning that Bossier Broadcasting's $30,000 estimate for operating expenses was not predicated on a specific detailed breakdown of anticipated expenses but was a judgment estimate based instead upon his past experience of how much it would cost to operate a good station in Bossier City; (b) that despite having estimated operation expenses at $30,000, Wharton testified while under cross examination that Bossier Broadcasting's first year operating expenses would include a variety of individual operation expenses, totalling up to a sum of $52,320 [9]; and (c) that in regard to construction costs, Bossier Broadcasting did not itemize its specific equipment costs in Item 1a, Section III of FCC Form 301, as called for by the application. Next, with respect to the availability of funds [10] to meet the proposed costs, the Judge found: (a) that Wharton's contribution of existing capital was made up of equipment, services and money and that his actual cash contribution was not disclosed; (b) that Bossier Broadcasting failed to establish that Dr. Taliaferro's contribution to existing capital could be relied upon since no explanation was furnished concerning Dr. Taliaferro's accounts receivable and

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[7] In designating the issue, the Commission explained that the financial scheme originally outlined in Bossier Broadcasting's application was no longer useful since the original partnership was dissolved. Thus, anticipating (since no new plan had been submitted) that Bossier Broadcasting would use the partnership assets to finance the proposed station, the Commission concluded that the applicant failed to establish its financial qualifications and predicated the issue upon the following four deficiencies contained in its application: (1) the bank loan commitment letter to Mr. Sterling, a partner, was unacceptable since it did not state the rate of interest, amount of collateral required or the other terms of the loan; (2) the balance sheets submitted by the other partners could not be relied upon since the assets were chiefly accounts receivable, and no specific showing had been made that such assets could be relied upon; (3) Dr. Taliaferro's balance sheet did not indicate the amount of liabilities payable during the next year on long term liabilities; and (4) the applicant's proposed cost of construction was unreasonably low.

[8] Bossier Broadcasting indicated in its original application that it would need $37,540 to meet construction and first year operation costs. At the hearing, however, Bossier Broadcasting submitted a revised financial statement listing construction and operating costs of $32,839.76 and $30,000, respectively. The record (Tr. 189) indicates that Bossier Broadcasting never amended its application to show the revised plan.

[9] Wharton underwent cross-examination from counsel for Dowd on its individual operation expenses since Bossier Broadcasting failed to submit an itemization of its revised operating costs as called for by the application. The sum of $52,320 listed above is in error. The correct sum reflected by the record is $42,320. The erroneous amount of $52,320 included $13,120 in salary for a traffic girl whereas the correct figure should have been $3,120. (Tr. 210).

[10] Bossier Broadcasting's revised financial plan indicates that it proposes to rely on a $30,000 loan from E. S. Sterling, one of its partners, net deferred credit on equipment of $14,338.44 and existing capital of $20,000. The $20,000 figure consists of a $5,000 contribution from both Mr. Sterling and Dr. Taliaferro and a $10,000 contribution from Mr. Wharton.

long term liabilities, see footnote 7, *Supra*; [11] and (c) that because Bossier Broadcasting failed to rectify the deficiencies in the bank loan commitment letter to Mr. Sterling, upon which the $30,000 loan in part was to be based, see footnote 7, *supra*, no determination could be made as to whether Sterling could meet his financial commitment. Bossier Broadcasting's exceptions [12] pertaining to the findings under this issue leave unclear the precise theory upon which it relies to support its contention that it is financially qualified, particularly in view of its failure to except to the Judge's findings concerning contributions to be made by Wharton and Dr. Taliaferro. However, the primary thrust of its exceptions appears to be that it is financially qualified because Mr. Sterling has sufficient assets, without assistance from the other partners, to finance the construction and operation of the proposed station. As noted earlier, however, see footnote 10, *supra*, Bossier Broadcasting's plan for obtaining the necessary funds is limited to the $30,000 loan from Sterling and contributions of $10,000, $5,000 and $5,000 from Wharton, Sterling, and Taliaferro, respectively. There is no record evidence that Mr. Sterling has agreed to finance the proposed station on his own or that he could meet that financial requirement. Accordingly, Bossier Broadcasting's argument relative to its financial qualifications must be rejected. Equally without merit is Bossier Broadcasting's contention that Mr. Sterling will be able to lend the applicant $30,000. The bank loan commitment letter, upon which the $30,000 loan was, in part, based was specifically found to be deficient by the Commission in its designation Order. Notwithstanding a specific description of these deficiencies by the Commission, Bossier Broadcasting's sole effort to rectify the deficiencies was to secure a postscript notation on the bank loan commitment letter relative to the interest rate of the loan. The applicant adduced no evidence concerning the collateral required or the other terms of the loan which had been questioned by the Commission. In sum, Bossier Broadcasting failed to set forth a clear and accurate picture of its financial condition. Since the burden of proof under this issue required Bossier Broadcasting to submit evidence upon which the Commission could base a finding that the applicant was financially qualified to construct and operate its proposed station for one year, we have no choice but to conclude that there has been a failure of proof on the applicant's part under the financial issue.

Suburban Community Issue

4. The Judge's conclusion that Bossier Broadcasting had not met its burden of proof pursuant to this issue was dictated by that applicant's almost total failure to offer evidence responsive to the issue. In defense of its showing, Bossier Broadcasting contends that it was dis-

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[11] The Judge notes that the only testimony regarding these subjects was Wharton's testimony that Dr. Taliaferro's balance sheet was based on what he had been told by Dr. Taliaferro and that it was his opinion that Dr. Taliaferro could meet his commitment.

[12] The Broadcast Bureau opposes consideration of Bossier Broadcasting's exceptions by the Review Board predicated upon numerous alleged deficiencies found in the exceptions. While the Board believes that many of Bossier Broadcasting's exceptions are not precise and that they do contain various deficiencies, we will consider the merits of Bossier Broadcasting's exceptions to the extent that we are able, since the applicant was not represented by legal counsel in preparing its exceptions.

criminated against by being required to supply evidence that was not required of the other applicants. Bossier Broadcasting's other exceptions relate to the Judge's findings on each of the subissues. With respect to subissues 1 and 3,[13] Bossier Broadcasting relies upon Section IV–A of its application (which it states was made part of the record) to demonstrate that Bossier City has programming needs separate and distinct from Shreveport, and that its program proposal is designed to meet those needs not being met by existing stations. With respect to subissue 2, *i.e.*, concerning the extent to which Bossier City's needs are being met by existing stations, Bossier Broadcasting concedes that the Shreveport stations can serve Bossier City, but argues that the Commission has a responsibility to ensure that cities, such as Bossier City, without local tranmission facilities are able to secure one. Finally, Bossier Broadcasting excepts to the Judge's findings that no factual support was submitted to support its projected revenues from Bossier City advertisers. It argues that Wharton's opinion regarding this subject should be sufficient to meet subissue 4[14] under the Suburban Community issue.

5. At the outset, the Review Board finds untenable Bossier Broadcasting's contention of discrimination. The evidentiary requirements of the Suburban Community issue apply to *every* applicant who falls within the formula enunciated in the *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965). In the instant case, Bossier Broadcasting's proposal falls within this formula since that applicant's proposed 5 mv/m daytime contour penetrates Shreveport, which has a population over 50,000 and is more than twice the population of Bossier City. In contrast, the proposals of Reese and Dowd are not effected by the formula since Reese proposes to serve Shreveport and Dowd's proposed 5 mv/m daytime contour does not penetrate the boundaries of Shreveport. The evidentiary requirements do not place the applicant in any kind of inescapable dilemma. They simply require that the applicant establish through a reasonable showing that its proposal will realistically provide a local transmission service for its specified community. Bossier Broadcasting's arguments with regard to subissues 1 and 3 are equally untenable. Bossier Broadcasting's reliance on Section IV–A of its application for its showing under these subissues of the Suburban Community issue fails to recognize the fundamental differences in emphasis involved in the ascertainment of community needs issue (commonly referred to as the *Suburban* issue) and the Suburban Community issue. The policy underlying the ascertainment of needs issue was adopted to insure that potential licensees make thorough efforts to ascertain the problems of their communities and that they formulate programming responsive to those needs. The identification of a community problem does not necessarily

[13] Subissue 1 relates to the extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs; Subissue 3 pertains to the extent to which the applicant's program proposal will meet the specific unsatisfied programming needs of its specified station.

[14] Subissue 4 pertains to the extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

indicate that no other station has formulated programming to deal with it. *Suburban* looks toward identifying such problems; Suburban Community goes beyond this and looks toward identifying problems that are different from problems in the nearby larger community and are not being treated by programming from existing stations. Such an additional showing is essential to a solution of the allocation question to which the Suburban Community policy addresses itself, and the findings made on the basis of such evidence are some of the indicators by which the Commission is able to decide whether an applicant is proposing a realistic local transmission service for its specified station location rather than for the larger nearby city. *WNAR, Incorporated*, 41 FCC 2d 110, 27 RR 2d 1119 (1973); reconsideration denied, FCC 73R–346, 42 FCC 2d 1124 (1973). Also see *Northern Indiana Broadcasters, Inc.*, 13 FCC 2d 546, 13 RR 2d 615 (1968); reargument denied, FCC 68R–472, 14 RR 2d 723 (1968); reconsideration denied, 15 FCC 2d 264, 14 RR 2d 725; review denied, FCC 70–86, January 21, 1970; *aff'd.* 459 F. 2d 1351, 23 RR 2d 2113 (D.C. Cir. 1972). Bossier Broadcasting's response to subissue 2, *i.e.*, the extent Bossier City's needs are presently being met, is not responsive and can be rejected quickly. The Commission stated in its *Policy Statement*, *supra*, that developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. This policy, however, in no way excuses an applicant from complying with its normal evidentiary burdens simply because the applicant states that it will serve a community presently lacking a local transmission service. The burden of proof regarding this subissue as well as each of the other subissues under the Suburban Community issue is on the applicant. *KWEN Broadcasting Co.*, 10 FCC 2d 753, 11 RR 2d 903 (1967); review denied, FCC 68–805, July 31, 1968; *aff'd.*, 414 F. 2d 1160, 16 RR 2d 206 (D.C. Cir. 1969). Finally with regard to the subissue concerning proposed revenues, the information sought here relates to the location from which the applicant will obtain its revenues, *i.e.*, from its specified station location or elsewhere. However, Bossier Broadcasting's showing under this subissue consists solely of testimony by Wharton, based on personal opinion [15] that Bossier City's advertisers provide one third of the advertising revenue for Shreveport stations. Accordingly, even if Bossier Broadcasting's showing is accepted, it fails to address the question posed under this subissue. In brief, we believe that the Judge correctly concluded that Bossier Broadcasting failed to meet its burden of proof under this issue. The applicant was given every opportunity to present evidence to overcome the implications of the Suburban Community issue but failed to do so. Furthermore, he did not amend his application to show Shreveport as his community of license. Accordingly, Bossier Broadcasting's application must also be denied under this issue.

Rule 1.263(c)

6. The Judge's final basis for denying Bossier Broadcasting's application is its tardiness in filing proposed findings of fact and con-

[15] Where personal opinion is to be relied upon, the factual basis underlying such opinion should be sufficiently detailed so that the Board has a meaningful factual basis for reaching a reasoned conclusion.

clusions. He acted[16] in response to a motion filed by Reese to strike Bossier Broadcasting's proposed findings of fact and conclusions and to preclude Bossier Broadcasting from further participation in this proceeding for failure to comply with Section 1.263(c) of the Commission's Rules, see footnote 2, *supra*. Bossier Broadcasting excepts, arguing that mere striking of a filing does not waive participation in a proceeding. We believe, however, that Bossier Broadcasting's conduct in the instant proceeding did constitute a waiver of its right to participate further. Section 1.263(c) contemplates that failure to file proposed findings of fact and conclusions, when directed to do so, within the specified period will not necessarily be deemed a waiver where special circumstances have been shown to exist. *Joseph M. Ripley, Inc.*, FCC 59–333, 18 RR 363. No special circumstances were present in the instant proceeding. Accordingly, we find no error in the Judge's denial of Bossier Broadcasting's application as a result of its failure to file timely proposed findings and conclusions pursuant to direction. *Cf. Independent Broadcasting Co., Inc.*, 30 FCC 44, 21 RR 230 (1961).[17]

REESE-DOWD APPLICATIONS

1.65 Issue

7. The Judge concluded that the applicant, Reese, violated Section 1.65 of the Commission's rules for failure to update its application[18] to reflect the acquisition of WOKJ, Jackson, Mississippi, and disposition of WOPI (FM), Bristol, Tennessee, by Tri-Cities Broadcasting Company (Tri-Cities). Mr. James Reese is a director and 27% stockholder in Tri-Cities. For this violation the Judge assessed a comparative demerit against Reese.[19] Dowd excepts to this finding, contending that Reese's failure to furnish a valid reason for not adhering to the requirements of Section 1.65 should disqualify him or at least warrant a serious demerit. We concur, however, with the Judge's conclusion that the 1.65 violation does not require disqualification of the Reese application. The record is devoid of any evidence indicating the existence of fraud, concealment or other misconduct severe enough to warrant disqualification. *Gross Broadcasting Co.*, 41 FCC 2d 729, 27 RR 2d 1543 (1973).

[16] Order, FCC 73M–286, released March 2, 1973.

[17] On July 24, 1973, Bossier Broadcasting filed a Motion to Disqualify, requesting that attorneys for the Broadcast Bureau, Reese and Dowd be disqualified from further participation in this proceeding for failure to comply with the Commission's requirement of service by airmail for persons residing more than 500 miles from the person effecting service. Section 1.47(f). In the alternative, Bossier Broadcasting requests that the "alleged procedural violations" assessed against it be dropped. The Review Board will deny both requests sought in the motion. Bossier Broadcasting has cited no precedential authority to support its request for disqualification based on a violation of 1.47(f) and we believe that such action would be unduly harsh, particularly in light of the fact that Bossier Broadcasting has made no showing that it suffered any prejudice whatever as a result of the alleged violation. Bossier Broadcasting's alternative request is also without merit since its "alleged procedural violations" have no relationship to any alleged violation of Rule 1.47(f).

[18] On November 1, 1973, Reese filed an amendment to the instant application to reflect that Tri-Cities Broadcasting Company consummated its purchase of Station WOKJ, Jackson, Tennessee, and sale of Station WOPI–FM, Bristol, Tennessee. In view of the fact that the petition is unopposed, and because there is no record support to show an attempt on the part of Reese to conceal this information from the Commission, we will grant the amendment.

[19] The Judge did not explicitly articulate in his conclusions that Reese should only be assessed a comparative demerit although it is implied in paragraph 11 of his conclusions of the Initial Decision.

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307(b) Issue [20]

8. Although most of the pertinent factual information is set forth in the Initial Decision, a brief summary of the facts, as reflected by the record, will assist in understanding our disposition of the 307(b) issue. Shreveport, which Reese proposes to serve, has a population of 182,064 persons [21] and is Louisiana's second largest city. The city is located in both Caddo (230,184 pop.) and Bossier (65,519 pop.) Parish and grew at a rate of 10.8% for the decade from 1960 to 1970. Shreveport is the center of the Ark-La-Tex area which reaches into northwest Texas, southwest Arkansas and all of northwest Louisiana. It is the transportation heart of this Tri-state area, serves as the medical focal point for eight million people living within a 200 mile radius of the city, and is the hub of one of the greatest oil and gas producing areas in America. Seven standard, five FM [22] and two television broadcast facilities are presently licensed to Shreveport. In contrast, the record is devoid of any comparable 307(b) information [23] concerning Vivian, Louisiana, which Dowd proposes to serve, other than the 1970 population statistics of Vivian (4,046 pop.) and Caddo Parish (230,184 pop.). Station KNCB is the only broadcast facility presently assigned to the city. Within its proposed 0.5 mv/m contour, Reese would provide service to 343,421 persons residing in an area of 4,236 square miles. There are a minimum of 5 and a maximum of 26 other services available within this area. Three urban communities are encompassed within its 2.0 mv/m contour and they presently receive at least five services. Dowd presently provides service to 63,938 persons residing in an area of 2,477 square miles within its 0.5 mv/m contour. Its new proposal would provide service to 250,472 persons residing in 3,688 square miles or a gain of 186,534 population living in an area of 1,211 square miles. There are a minimum of 5 and a maximum of 17 services presently available within this area. Three urban communities, Shreveport, Bossier City and Cooper Road, which comprise more than 81% of the population of Dowd's total gain area, are encompassed within Dowd's proposed 2.0 mv/m gain area. These communities receive at least five reception services. A common area of 682 square miles in which 170,892 persons live, would be served by both proposals. The common area represents 91.6% of the population and 56.3% of the area that would be gained by Station KNCB. Predicated upon the absence of any showing by Dowd relating to the benefits to Vivian or its proposed gain area, the Judge concluded that the Reese proposal would better meet the objectives of Section 307(b). The Broadcast Bureau excepts to this conclusion and asserts that neither party is entitled to a preference under the transmission or reception aspects of

[20] The facts of record, as they pertain to Bossier Broadcasting, are not included in our discussion of the 307(b) considerations since it has long been established that an applicant is not entitled to consideration under Section 307(b) of the Act unless and until all outstanding and prerequisite qualifying issues against it have been favorably resolved. *Media, Inc.*, 41 FCC 2d 30, 27 RR 2d 1077 (1973).

[21] All population figures are taken from the 1970 census. The Shreveport Standard Metropolitan Statistical Area (SMSA) has a population of 294,703.

[22] Station KTAL–FM, which is licensed for both Texarkana and Shreveport was omitted from the number listed in the Initial Decision.

[23] Counsel for Dowd stated that he did not believe that it would be particularly edifying to submit 307(b) demographic data with respect to Dowd's proposed gain area. (Tr. 136).

the 307(b) issue. Dowd and Reese, on the other hand, contend that the Section 307(b) issue is determinative. Dowd, however, excepts to the Judge's conclusion preferring the Reese proposal under this issue and argues that nowhere has the Judge found any need for a new standard broadcast facility in Shreveport. Dowd further argues that grant of the 1300 kHz facility to it would provide Vivian with a new first transmission facility and would better comport with the standards of *Broadcast Station Assignment Standards*, 39 FCC 2d 645, 26 RR 2d 1189 (1973), by allowing the 1600 kHz frequency to become available in the assignment of another standard broadcast station.

9. Section 307(b) of the Communications Act of 1934, as amended, imposes a statutory duty upon the Commission "to provide a fair, efficient, and equitable distribution of radio service . . . among the several States and communities" when considering mutually exclusive applications for such facilities. This duty requires the Board to award a Section 307(b) preference in all cases, where possible, and to place decisional significance thereupon if the facts permit. *Nelson Broadcasting Co.*, 3 FCC 2d 239, 7 RR 2d 181 (1966); reconsideration denied, 4 FCC 2d 224, 8 RR 2d 341 (1966); modified, 5 FCC 2d 211, 8 RR 2d 890 (1966). In the instant proceeding, while the 307(b) judgment is a close one, we concur with the Judge's conclusion that there are sufficient differences between the two proposals to enable a 307(b) choice to be made. In this regard, it is our view that grant of the Reese application under the "fair and equitable" factors would best satisfy the objectives of the congressional mandate. The Commission, in determining "fair and equitable" distribution of broadcast facilities, looks to the relative needs of the communities, specified by the applicants, for a new transmission facility and to the needs of the respective service areas for a new reception service. *Kent-Ravenna Broadcasting Co.*, FCC 61–1350, 22 RR 605 (1961). The transmission aspect of the 307(b) inquiry is weighed in light of the populations of each of the communities and the number of standard broadcast facilities presently licensed therein while the reception aspect looks to the number of reception services available within the respective service areas, the relative populations, and the extent of the areas to be served.

10. Applying the considerations set forth above to the facts before us, we turn initially to the transmission aspects of the case. It is well established that an applicant already providing a transmission service for its entire community is not entitled to any credit for the transmission aspect of its new proposal. *Cf. WNOW, Inc.*, 37 FCC 961, 3 RR 2d 875 (1964); reconsideration denied, 38 FCC 471, 4 RR 2d 857 (1965); *Sawnee Broadcasting Company* (*WSNE*), 8 FCC 2d 503, 10 RR 2d 175 (1967); application for review denied, 11 FCC 2d 370, 12 RR 2d 24 (1968); and *Chapman Radio and Television Company*, 19 FCC 2d 157, 17 RR 2d 60 (1969); reconsideration denied, 20 FCC 2d 624, 17 RR 2d 1028 (1969); remanded, 24 FCC 2d 282, 19 RR 2d 589 (1970); reconsideration dismissed, FCC 71–896, September 1, 1971. In this connection, there is no record evidence that Dowd's facility, KNCB, is not serving its entire community; nor is there any record support that the proposed change in frequency would offer any improvement in its existing service to Vivian. Further, with regard to a transmission out-

let for its gain area, the record reflects that Dowd's gain area consists primarily of urban populations residing in communities other than Vivian. The rural population residing in the gain area is very sparse and Dowd adduced no evidence indicating that these people are in any way linked to Vivian. Shreveport has a substantially greater population than Vivian and Reese's extensive demographic showing demonstrates that the city has had a substantial growth rate, is very active commercially and plays an important role in relationship to its surrounding area. Reese will provide an additional, not a substitute, transmission service to Shreveport. We believe, thus, that Dowd's contention that Reese has not established a need for a new standard broadcast station in Shreveport is incorrect. Equally incorrect is Dowd's final contention that it should be preferred because it would make available a standard broadcast facility should it be awarded the 1300 kHz frequency.[24] [25] No precedential authority has been cited to support this position and any attempt to determine whether the 1600 kHz frequency could or would be utilized in that area in the future would be an exercise into the realm of surmise and speculation. Moreover, we do not agree with Dowd's assertion that its proposal would better comport with the standards of *Broadcast Station Assignment Standards, supra.* In that Report and Order, the Commission indicated that its objective is to control the expansion of the standard broadcast service by limiting future grants of new standard broadcast stations or changes in existing stations to those situations in which improvements in the existing level of aural service are clearly needed, and cannot readily be achieved by alternative means. In the instant case, as noted previously, there is no record evidence that the grant of the 1300 kHz to Dowd would offer any improvement in its existing service. Moreover, the standards enunciated by the Commission in the report are only applicable to applications filed after the effective date of the new rules, which was April 10, 1973. In sum, although a substantial preference cannot be awarded where, as here, there are numerous transmission outlets assigned to Shreveport, we are of the opinion that a modest preference must be given to Reese on the transmission aspect of its proposal.

11. Turning next to the question of the relative needs of the proposed service areas for the applicants' proposals, Reese would serve a considerably larger population, although this factor must be substantially discounted since Reese's and Dowd's proposed reception areas are for the most part well served. *Cf. Kittyhawk Broadcasting Corporation,* 20 FCC 2d 1011, 18 RR 2d 125 (1969); review denied, FCC 70–891, August 26, 1970. However, in addition, Shreveport's important role in

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[24] In this connection, Dowd at oral argument urged that its position is supported by *Babcom, Inc.*, 27 FCC 2d 437, 21 RR 2d 6 (1971), set aside, 31 FCC 2d 425, 22 RR 2d 828 (1971), which, it asserts, is applicable here because the relinquishment of the 1600 kHz frequency by Dowd for another applicant would result in a second service to the area. The Board believes, however, that *Babcom, supra,* is inapposite. In *Babcom, supra,* we indicated that the presumptive need for a first competitive voice in a community outweighs the need in a larger community for a fifth standard facility. Here, Dowd does not propose a facility which would provide a competitive voice in Vivian.

[25] Dowd's contention that grant of the 1300 kHz facility to it would provide Vivian with a new first transmission facility is in error since Vivian presently has a transmission service in KNCB, albeit on 1600 kHz.

relationship to its surrounding area makes it clear that Reese's proposal is more closely attuned to the needs and interests of the area to be served by both applicants.[26] Under these circumstances, we believe that a slight preference to Reese under the reception criterion is warranted.[27]

Accordingly, while the 307(b) considerations here are close, we find a preference under both the transmission and reception aspects in favor of Reese is sufficient to make a 307(b) choice between the proposals. In summary, we have weighed and balanced the competing considerations in making our 307(b) determination and conclude that the "fair, efficient and equitable distribution of radio service * * * among the several states and communities" is better achieved by grant of Reese's application and denial of the Dowd application.

12. Accordingly, IT IS ORDERED, That the Petitions for Leave to Amend Application, filed July 20 and September 27, 1973, by Ruby June Stinnett Dowd, d/b/a North Caddo Broadcasting Company, ARE GRANTED to the extent indicated herein, and DENIED in all other respects and the amendments ARE ACCEPTED; and

13. IT IS FURTHER ORDERED, That the Motion to Disqualify, filed July 24, 1973, by E. S. Sterling, Joel E. Wharton and Dr. T. J. Taliaferro, d/b as Bossier Broadcasting Company IS DENIED; and

14. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed November 1, 1973, by James E. Reese IS GRANTED and the amendment IS ACCEPTED; and

15. IT IS FURTHER ORDERED, That the application of James E. Reese for a construction permit for a new standard broadcast station on 1300 kHz, 500 watts, Day, Shreveport, Louisiana IS GRANTED; and that the applications of E. S. Sterling, Joel E. Wharton and Dr. T. J. Taliaferro d/b as Bossier Broadcasting Company and Ruby June Stinnett Dowd, d/b/a North Caddo Broadcasting Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER,
Member, Review Board.

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[26] *Cf. Meredith Colon Johnston,* 33 FCC 2d 324, 23 RR 2d 671 (1972); *aff'd.,* FCC 73–165, February 14, 1973. In *Johnston, supra,* the Review Board awarded a 307(b) preference to an existing licensee over an applicant for a new station predicated primarily on the fact that there were a lesser number of stations received in the licensee's gain area than in the new applicant's proposed service area. The losing applicant, who proposed to serve a greater population, urged that its proposed signal would include virtually all of the licensee's proposed service area. In rejecting this argument the Board indicated that the existing licensee's proposal was more closely attuned to the needs and interests of the gain area, conversely to the situation found here.

[27] At oral argument, the Broadcast Bureau asserted that little or no reception preference should be given either applicant citing *Resort Broadcasting Co., Inc.,* 41 FCC 2d 640, 27 RR 2d 1379 (1973). *Resort, supra,* however, is distinguishable from the facts of this proceeding since the population disparity of the proposed service areas there was substantially less pronounced than in the instant case and because neither community of license involved in *Resort, supra,* is comparable to Shreveport in its importance to the surrounding area.

APPENDIX

Rulings on Exceptions of E. S. Sterling, Joel E. Wharton and Dr. T. J. Taliaferro, d/b as Bossier Broadcasting Company[28] [29]

Exception No.	*Ruling*
1	*Denied* as argumentative and for the reasons stated in paragraph 6 of this Decision.
2	*Denied.* The findings of the Administrative Law Judge accurately reflect the record evidence.
3	*Granted* with regard to Station KTAL–FM and the correction is made. See footnote 22 of the Decision. *Denied* with regard to KTAL–TV as being inaccurate.
4, 14, 24, 33	*Denied* as unsupported by the record.
5	*Denied* as argumentative and contrary to the weight of the record evidence.
6	*Denied* as being without decisional significance.
7	*Denied* as being argumentative, unsupported and without decisional significance.
8, 9	*Denied.* The findings of the Administrative Law Judge accurately reflect the record and no basis for these exceptions is offered.
10, 19	*Denied* as argumentative and unsupported by the record.
11, 13, 15, 16, 17, 23, 35, 36.	*Denied* as argumentative.
12	*Denied.* The exception requests a finding already in the Initial Decision. See paragraph 15 of the Initial Decision. It is also without decisional significance since Bossier Broadcasting's application must be denied under the Suburban Community and financial issues and for failure to comply with Rule 1.263(c).
18	*Denied* for the reasons stated in paragraph 3 of this Decision and as unsupported by the record.
20, 21	*Denied* as argumentative and for the reasons stated in paragraph 3 of this Decision.
22	*Denied* as argumentative. See footnote 18 of this Decision.
25, 26, 27, 28, 30, 31	*Denied* as argumentative and for reasons stated in paragraph 5 of this Decision.
29	*Denied* as argumentative and inaccurate.
32	*Denied.* Nothing in the record raises any questions as to the reliability of the exhibit upon which paragraphs 49 to 52 of the Initial Decision are predicated. Had Bossier Broadcasting wished to question the accuracy of Reese Exhibit No. 9, it could have done so at the hearing. In the absence of such an effort, an exception to the Judge's reliance on this exhibit is, at this point, baseless.
34	*Denied.* No basis is offered for this exception.
37	*Denied* as argumentative. See footnote 6 of this Decision.

[28] None of Bossier Broadcasting's exceptions comply with Section 1.277 of the Commission's Rules as they fail to contain specific references to the page or pages of transcript of hearing, exhibit, or order on which the exception is based. Consequently, the Board could reject all of Bossier Broadcasting's exceptions on that basis alone. However, for the reason stated in footnote 12, *supra*, the Board will attempt to rule on Bossier's exceptions.

[29] Following Bossier Broadcasting's listed exceptions in its pleading, a number of arguments are inserted in the remaining portion of the pleadings. The Review Board has reviewed these arguments and believes that the reasons for our decision have already clearly been set forth. Accordingly, no further discussion of these arguments in this decision is necessary.

Rulings on Exceptions to Conclusions

Exception No.	*Ruling*
1	*Denied* as argumentative. See paragraph 6 of this Decision.
2, 3, 7	*Denied* as unsupported by the record.
4, 8	*Denied* as being without decisional significance.
5	*Denied.* No basis for this exception is offered.
6, 9	*Denied.* See footnote 20 of this Decision.
10	*Denied* for reasons stated in paragraphs 3, 5 and 6 of this Decision.
11	*Denied* as argumentative.

Rulings on Exceptions of Ruby June Stinnett Dowd, d/b/a North Caddo Broadcasting Company

Exception No.	*Ruling*
1, 3, 5, 11	*Denied* for the reasons stated in paragraphs 10 and 11 of this Decision.
2, 4	*Denied* as being without decisional significance. See paragraph 10 of this Decision.
6	*Denied.* The Judge's finding correctly and fairly reflects the record.
7	*Granted* insofar as the Administrative Law Judge stated that the 307(b) considerations are analogous here with a Suburban Community issue. *Denied* in all other respects. See paragraph 9, 10 and 11 of this Decision.
8, 9	*Denied* as being without decisional significance. As indicated in paragraph 2 herein, we hold the 307(b) issue dispositive and therefore need not pass on the Judge's findings under the contingent comparative issue.
10	*Denied* for reasons stated in paragraph 7 of this Decision.

Rulings on Exceptions of James E. Reese

Exception No.	*Ruling*
1	*Granted.*
2	*Granted* since there is no record support for the inference that Reese altered his testimony based upon the realization that the WOPI transfer was still pending.
3	*Granted.*
4	*Granted.* See footnote 4 of this Decision.
5	*Granted.* See footnote 19 of this Decision.
6	*Granted* in substance. See paragraphs 10 and 11 of this Decision.

Rulings on Exceptions of the Broadcast Bureau

Exception No.	*Ruling*
1	*Denied.* The Judge's findings correctly and fairly reflect the record.
2	*Granted* insofar as the Administrative Law Judge stated that the 307(b) considerations are analogous here with a Suburban Community issue. Denied in all other respects. See paragraphs 9, 10 and 11 of this Decision.
3	*Granted.* See footnote 4 of this Decision.
4	*Granted.* See footnote 19 of this Decision.

DISSENTING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

I dissent on the ground that the majority's refusal to grant Mrs. Dowd's request to reopen the record and to remand the proceeding to the Administrative Law Judge for the adduction of evidence concerning Mrs. Dowd's qualifications constitutes a denial of due process. As a result, the majority has foreclosed itself the opportunity to weigh the merits of a grant which would permit the only broadcast station (KNCB) in the rural community of Vivian (pop. 4,046) to improve its facilities and service to adjacent rural areas vis-a-vis a grant to Shreveport (pop. 182,064) which presently has *seven* AM stations, *five* FM stations and *two* television stations.

With respect to the 307(b) issue, I would, at the very least, hold with the Broadcast Bureau that neither Shreveport nor Vivian is entitled to a preference. Therefore, the comparative issue becomes determinative. Since the Commission has granted the assignment of license of KNCB to Mrs. Dowd as an individual in August 1973, the Board cannot resolve the comparative issue without having evidence of her qualifications in the record. This can be accomplished only by reopening the record and remanding the proceeding to the Presiding Judge as requested by Mrs. Dowd. See *Norristown Broadcasting Co., Inc.*, 18 FCC 2d 56, 16 RR 2d 421 (1969), where the Board stated in pertinent part:

> 5. The Review Board is of the opinion that the substitution of WNAR as the applicant in this proceeding and the January 30, 1969 amendment should be allowed, and that WNAR should be afforded the opportunity to demonstrate at an evidentiary hearing not only the extent to which its program proposal (see note 6, *supra*) meets the specific and unsatisfied needs of its specified station location, but also the other factors utilized by the Commission in determining whether an applicant has met its burden under a suburban community issue. The Board will therefore reopen the record and remand this proceeding to the hearing examiner for the adduction of further evidence and for the preparation of a supplemental initial decision. At the same time, we believe that the issues in this proceeding should be enlarged by the specification of financial and *Suburban* issues against the substituted applicant WNAR.

F.C.C. 73D-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JAMES E. REESE, SHREVEPORT, LA.	Docket No. 19507 File No. BP-18318
RUBY JUNE STINNETT DOWD,[1] EXECUTRIX OF THE ESTATE OF ALVIS N. DOWD, DECEASED, VIVIAN, LA.	Docket No. 19508 File No. BP-18369
E. S. STERLING, JOEL E. WHARTON, AND DR. T. J. TALIAFERRO, D.B.A. BOSSIER BROADCASTING CO., BOSSIER CITY, LA.	Docket No. 19509 File No. BP-18507
For Construction Permits	

APPEARANCES

Robert W. Coll, on behalf of James E. Reese; *Lauren A. Colby*, on behalf of Ruby June Stinnett Dowd, Executrix of the Estate of Alvis N. Dowd, Deceased; *Julian P. Freret* and *Joel E. Wharton*, on behalf of Bossier Broadcasting Company; and *Robert B. Nelson* and *Walter C. Miller*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERICK W. DENNISTON

(Issued April 13, 1973; Released April 20, 1973)

PRELIMINARY STATEMENT

1. This proceeding involves three mutually exclusive standard broadcast applications. James E. Reese (Reese) seeks to operate on 1300 kHz, 500 watts, daytime, in Shreveport, Louisiana; E. S. Sterling, Joel E. Wharton and Dr. T. J. Taliaferro, d/b as Bossier Broadcasting Company (Bossier Broadcasting) would operate on 1300 kHz, 1 kw, daytime, in Bossier City, Louisiana. The third applicant, Alvis N. Dowd, presently operates on 1600 kHz, 5 kw, daytime, in Vivian, Louisiana (Station KNCB), and would switch to 1300 kHz with the same power, daytime, at the same community.

[1] On November 20, 1972, Alvis N. Dowd died and his widow, Ruby June Stinnett Dowd, as Executrix was substituted as applicant herein. See Order released February 5, 1973 (FCC 73M-159). References herein to Dowd embrace the substituted applicant. Attached to the petition filed by the Executrix, an holographic will of Alvis N. Dowd devises a half interest in KNCB, Vivian, Louisiana, to his widow and the remaining half to his brother, R. S. Dowd.

2. The Commission's designation Order (FCC 72–423, released May 22, 1972) specified the following issues:

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary aural (1 mv/m or greater in the case of FM) service to such areas and populations.

2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station KNCB and the availability of other primary aural (1 mv/m or greater in the case of FM) service to such areas and populations.

3. To determine with respect to the application of James E. Reese:

(a) The terms, conditions and availability of his bank loan;

(b) Whether, in the light of the evidence adduced pursuant to (a), above, the applicant is financially qualified.

4. To determine whether Bossier Broadcasting Company is financially qualified to construct and operate its proposed station.

5. To determine whether James E. Reese has complied with the provisions of section 1.65 of the Commission rules by keeping the Commission advised of substantial and significant changes as required by section 1.65, and, if not, the effect of such noncompliance on his basic or comparative qualifications to be a Commission licensee.

6. To determine whether the proposal of Bossier Broadcasting Company will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs;

(b) The extent to which the needs of the specified station location are being met by existing aural broadcast stations;

(c) The extent to which the applicant's program proposal will meet the specific unsatisfied programming needs of its specified station location;

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

7. To determine, in the event that it is concluded pursuant to the foregoing issue that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely Shreveport, Louisiana.

8. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

9. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would, on a comparative basis, better serve the public interest.

10. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted.

3. A prehearing conference was held on July 6, 1972. Hearing sessions were held on September 6 and 7, 1972. A late filed exhibit was received by the Administrative Law Judge on September 20, 1972, and the record was closed (FCC 72M–1193). Proposed findings were filed by Reese, Dowd and the Bureau. Replies were filed by Reese and Dowd.

4. Proposed findings were to be filed on October 30, 1972, but this date was subsequently extended to November 30, 1972, and ultimately to January 2, 1973, with replies due on January 12, 1973 (the latter

date subsequently was extended to January 22, 1973). Bossier Broadcasting filed a document entitled "Proposed Findings of Fact and Conclusions," postmarked January 12 and received at the Commission on January 16, 1973, thus filing out of time. By Motion to Strike filed January 22, 1973, Reese requests that Bossier City's filing be stricken on the grounds of untimely filing, and the Broadcast Bureau, by its Limited Reply filed January 22, 1973, urges that no consideration be given to the Bossier City document citing, in addition to its lateness, numerous procedural defects and the fact that many of the proposed findings are based on non-record evidence, are vague, incomprehensible and meaningless, and involve, among other things, rhetorical questions, conjecture and speculation. The Motion to Strike has been granted [2] and, as the filing of proposed findings was directed, Bossier City has waived its right to further participation herein pursuant to Section 1.263(c) of the Rules. Nevertheless, the facts of record, as they pertain to Bossier City, will be discussed herein.

FINDINGS OF FACT

Issues 1 and 2—Areas and Populations—Gain and Loss
James Reese

5. Shreveport, Louisiana had a 1970 Census population of 182,064. It is the seat of Caddo Parish (population—230,184), but it is also partly located in Bossier Parish (population—64,519). The Shreveport Urbanized Area has a population of 234,564.

6. There are 7 standard broadcast stations, 4 FM stations, and 2 TV stations presently authorized to Shreveport. They are:

AM: KEEL, 710 kHz, 5 kw, 50 kw-LS, DA-2, U, II
KCIJ, 980 kHz, 5 kw, D, III
KWKH, 1130 kHz, 50 kw, DA-N, U, I-B
KBCL, 1220 kHz, 250 watts, D, II
KRMD, 1340 kHz, 250 watts, 1 kw-LS, U, IV
KJOE, 1480 kHz, 1 kw, D, III
KOKA, 1550 kHz, 500 watts, 10 kw-LS, DA-N, U, II
FM: KBCL-FM, 96.5 MHz, 100 kw, 250 ft., C
KEEL-FM, 93.7 MHz, 100 kw, 265 ft., C
KJKL, 101.1 MHz, 25 kw, 185 ft., C
KROK, 94.5 MHz, 100 kw, 400 ft., C
TV: KSLA-TV, Ch. 12, 295 kw, 1800 ft.
KTBS-TV, Ch. 3, 100 kw, 1780 ft.

7. *Reese Coverage.* Based on an effective field of 134 mv/m (190 mv/m/kw) and pertinent M-3 ground conductivities, Reese's 0.5 mv/m contour would embrace 343,421 people in a 4,236 square mile area. As proposed, he would provide 2.0 mv/m or greater service to the following urban areas:

Urban area:	*Population*
Shreveport	182,064
Cooper Road (unincorporated)	9,034
Bossier City	41,595
Caddo Parish (unincorporated part of Shreveport urbanized area)	1,871

[2] See Order released March 2, 1973, FCC 73M-286.

8. *Availability of Other Services.* Standard broadcast stations KEEL, KCIJ, KWKH and KOKA, all in Shreveport, provide 0.5 mv/m or greater primary service to all of the rural areas located within Reese's proposed 0.5 mv/m contour; KNOE, Monroe, Louisiana serves 75–99% thereof; and KTBB, Tyler, Texas serves 0–24%, which includes the area not served by Station KNOE. Moreover, 20 other stations serve portions of the proposed rural area. Thus, a minimum of 5 standard broadcast services are available to all of the proposed rural area.

9. Standard broadcast stations KEEL, KCIJ, KWKH, KBCL and KOKA, Shreveport, Louisiana provide 2.0 mv/m or greater primary service to all of the aforementioned urban areas located within the proposed 2.0 mv/m contour.

Alvis N. Dowd

10. Vivian, Louisiana has a population of 4,046. It is located in the extreme northwestern corner of the state, in Caddo Parish, about 30 miles north-northwest of Shreveport. Aside from existing Station KNCB, there are no other existing stations assigned to Vivian. Since Dowd already serves Vivian, no additional transmission or reception service would be furnished Vivian if Dowd's proposal were granted.

11. *Dowd Coverage.* Field intensity measurements were made on KNCB's present operation at nine azimuths, namely: 68.5; 95.7; 122; 187; 220.5; 256; 274; 291; and 333.5 degrees true. These measurements were used to define the extent of both the present and proposed service contours within two sectors; that is, between 58.5 and 132 degrees and between 177 and 343.5 degrees. Over the arcs 343.5 to 58.5 degrees and 132 to 177 degrees, both the present and proposed service contours were projected on the basis of predicted effective fields and Figure M–3 ground conductivities. The present and proposed coverage and resulting gain area are as follows:

Contour (mv/m)	Population	Area (square miles)
Present 0.5	63,938	2,477
Proposed 0.5	250,472	3,688
Gain	186,534	1,211

12. Urban areas within Dowd's proposed gain area which would receive primary service (2.0 mv/m or greater) from Dowd's proposal are as follows:

Urban area	Total population	Population served	Percent served
Shreveport	182,064	101,561	55.8
Bossier City	41,595	41,595	100.0
Cooper Road (unincorporated)	9,034	9,034	100.0
Total		152,190	

13. *Availability of Other Services.* Standard broadcast stations KEEL, KCIJ and KWKH, Shreveport provide 0.5 mv/m or greater primary service to all of the rural gain area. KNOE, Monroe, Louisiana; KOSY, Texarkana, Arkansas; KVMA, Magnolia, Arkansas; and KALT, Atlanta, Texas serve 75–100%; and KATQ, Texarkana, Arkansas and KJOE, Shreveport, serve 50–75%. In addition, 8 others serve lesser portions. Thus, a minimum of 5 AM services are available to all the rural gain area. Standard broadcast stations KEEL, KCIJ, KWKH, KBCL and KOKA, all in Shreveport, provide 2.0 mv/m or greater primary service to all the urban area located within the proposed 2.0 mv/m gain area.

14. *Dowd-Reese Common Service Area.* Station KNCB's proposed gain area would overlap Reese's proposed primary service area to the extent that there would be a common area served by both, including 170,892 people in a 682 square mile area. That population includes 152,340 people in urban areas of which 101,711 reside in Shreveport, 41,595 reside in Bossier City, and 9,034 reside in Cooper Road. The remaining 18,552 people are rural population. The common area represents 91.6% of the population and 56.3% of the area that would be gained by Station KNCB. Similarly, it represents 49.8% of the population and 16.1% of the area that Reese would serve.

Bossier Broadcasting Company

15. Bossier City, Louisiana has a population of 41,595. It adjoins the northeast corner of Shreveport and is separated therefrom by the Red River. It is situated in Bossier Parish and is a part of the Shreveport Urbanized Area. There are no broadcast facilities presently authorized to Bossier City.[3]

16. *Bossier Broadcasting Coverage.* Based on an effective field of 176 mv/m and on Figure M–3 ground conductivities in all directions, except in the arc 67 and 117 degrees true where ground conductivity values obtained from field intensity measurements taken on nearby stations KJOE and KCIJ, Shreveport, were used, Bossier Broadcasting's proposed 0.5 mv/m coverage would embrace 364,816 people over an area of 4,441.5 square miles.

17. Bossier Broadcasting's proposed operation would also provide 2.0 mv/m or greater primary service to the following urban areas:

Urban area:	*Population*
Bossier City	41,595
Shreveport	182,064
Cooper Road	9,034

18. *Availability of Other Services.* Standard broadcast stations KEEL, KCIJ, KWKH and KOKA, Shreveport provide 0.5 mv/m or greater primary service to all of the rural area within the proposed 0.5 mv/m contour. KNOE, Monroe, Louisiana serves 75–99% thereof; and KTBB, Tyler, Texas serves 0–24%, including the area not served

[3] Joel E. Wharton, a 50% partner in Bossier Broadcasting Company, also has a 10% interest in the pending Bossier Broadcasting Company's FM application for Bossier City on Channel 261A (File No. BPH–8011). The channel is assigned to Shreveport, but is available to Bossier City under Section 73.202(b) of the Rules. The proposed FM station, if authorized, would provide service (1.0 mv/m or greater) to some 6% of the area within the proposed 0.5 mv/m contour (Bossier Ex. 1, H–1; Bossier Ex. 8; also see BPH–8011).

by Station KNOE. In addition, 20 other stations serve portions of the proposed rural area. Thus, there are at least 5 AM services available to all portions. Moreover, seven FM stations provide 1.0 mv/m or greater service to various sectors within the proposed 0.5 mv/m contour.

19. Shreveport stations KEEL, KCIJ, KWKH, KBCL and KOKA provide 2.0 mv/m or greater primary service to all of Shreveport, Bossier City, and Cooper Road.

20. *Reese-Bossier Broadcasting Common Service Area.* Reese's and Bossier Broadcasting's transmitter sites are five miles apart, and each primary service area substantially duplicates the other.

21. *Dowd-Bossier Broadcasting Common Service Area.* Station KNCB's proposed gain area overlaps Bossier Broadcasting's proposed primary service area so that the common area would include 171,444 people in 717 square miles. The population includes 152,340 people in urban areas of which 101,711 reside in Shreveport, 41,595 reside in Bossier City, and 9,034 reside in Cooper Road. The remaining rural population totals 19,104 persons. The common area represents 91.9% of the population and 59.2% of the area that would be gained by Station KNCB. It also represents 47% of the population and 16.1% of the area that would be served by Bossier Broadcasting.

Issue 3—Reese's Financial Issue

22. The Gulf National Bank of Gulfport, Mississippi, is willing, as of June 1, 1972, to lend Reese $50,000 at the rate of 1% over the prime rate at the time of the loan. As far as collateral is concerned, the Bank indicated that "[v]ery likely, we will be able to make the loan on an open note with [Reese's] wife countersigning the note." Reese indicated that his wife knew that she may be asked to countersign for the open note. However, the bank went further. It indicated that if it should desire collateral, it would accept Reese's stock in Tri-Cities Broadcasting Company or his stock in E. O. Roden and Associates or a second mortgage on Reese's real estate and/or other personal assets listed in Reese's financial statement. Reese will comply with these stock or mortgage requirements if necessary.

Issue 4—Bossier Broadcasting's Financial Issue

23. In its original application, Bossier Broadcasting indicated it would need $37,540 to meet first-year construction and operation costs consisting of equipment lease payments of $3,840; land, $1,200; building, $1,000; miscellaneous costs, $1,500; and first-year working capital, $30,000.

24. At the hearing Bossier Broadcasting submitted a revised financial statement listing construction costs of $32,839.76 and first-year operating costs of $30,000. It proposes to meet these costs with a $30,000 loan from E. S. Sterling, one of the partners, net deferred credit on equipment of $14,338.44, and existing capital of $20,000.

25. Since Bossier Broadcasting failed to submit an itemization of the revised operating costs as called for by the application, Alvis Dowd's counsel cross-examined Joel Wharton, a 50% owner and only partner to testify. It was discovered that Bossier Broadcasting's first-year operating costs would include: $23,400 for announcer's salaries;

$10,000 for newsmen's salaries; $13,120 in salary for a traffic girl; $600 for billing services; $540 for electricity; $2,860 for wire service fees; $1,200 for music licensing fees; and $600 for office supplies, which total $52,320. Wharton further stated that he expected to receive $10,000 for himself from sales commissions. When it was called to his attention that the total expenses he had testified to substantially exceeded his revised first-year operating estimate of $30,000, Wharton admitted that the $30,000 estimate of operating costs did not include a specific figure for salaries. He was further unable to supply a breakdown of his operating costs alleging that based on his past experience, the $30,000 is a judgment estimate of the minimum figure on which he could operate a "very good" station.

26. Regarding other construction costs, Bossier Broadcasting also failed to allocate the expenses for specific equipment costs as called for by the application. While Wharton submitted a revised letter of credit for equipment valued at $20,639.06 from the CCA Electronics Corporation, and while that letter lists the specific equipment to be provided, it does not set out the cost for each item.

27. Bossier Broadcasting would meet its first-year construction and operating expenses in part with $20,000 in existing capital. This $20,000 would purportedly consist of $5,000 contributions from both E. S. Sterling and Dr. Taliaferro and a $10,000 contribution from Joel Wharton. Wharton's financial statement in the amended application indicates his contribution is not a cash commitment but is made up of $2,100 in equipment and $3,500 of "services and cash," the remaining $4,400 being listed as "possible liability." The actual cash contribution of Wharton is not disclosed.

28. The Commission, in its designation Order, also questioned whether Dr. Taliaferro's balance sheet could be relied upon since the listed assets consisted chiefly of accounts receivable, and there was no showing in the application on why such assets could be relied upon to meet the proposed commitment. Bossier Broadcasting did not produce Dr. Taliaferro to explain these accounts. Instead Wharton testified that the information previously submitted in Bossier Broadcasting's application regarding Dr. Taliaferro's balance sheet was based on what Taliaferro told Wharton. Thus, it cannot be determined that Dr. Taliaferro can meet his proposed financial commitment.

29. The Commission also pointed to another deficiency in Dr. Taliaferro's balance sheet in that it did not indicate the amount of liabilities payable during the next year on long-term liabilities. As noted, *supra*, Taliaferro did not testify in this proceeding. While Wharton expressed the opinion that Dr. Taliaferro can meet his commitment and "more," no clarification of the question raised by the Commission's Order was offered.

30. The Commission's designation Order also noted that the $30,000 loan to the partnership from E. S. Sterling was based in part on a $25,000 loan Sterling would obtain from the Tyler Bank and Trust Company; and, that the bank loan commitment did not state the rate of interest, amount of collateral required, or any other terms of the loan. No new bank loan commitment was submitted, Bossier Broadcasting merely introducing the old loan commitment through Wharton

with addition of a postscript notation on the bottom signed by the bank's president, indicating that the loan would be "at the prevailing rate at the time of the loan." However, no mention was made of the amount of collateral required by the bank. Bossier Broadcasting, through its Ex. 5, argues that Mr. Sterling can borrow $25,000 on his signature. However, the original bank letter indicates on its face that the bank is loaning Sterling money on "ample assets." In other words, although specifically requested by the Commission to do so, Bossier Broadcasting has never specified what assets the bank was referring to in the letter. Moreover, Bossier Broadcasting has not indicated the "other" terms of the loan called for by the Commission. Thus, it cannot be concluded that Mr. Sterling can meet his commitment.

Issue 5—Reese Section 1.65 Issue

31. The Commission designated a 1.65 failure to report issue against Reese. In so doing it pointed out: (a) that James Reese is a director and 27% stockholder in Tri-Cities Broadcasting Company; (b) that on March 10, 1971, Tri-Cities had acquired WOKJ, Jackson, Mississippi; (c) that on November 30, 1971, Tri-Cities had sold Station WOPI(FM), Bristol, Tennessee; and (d) that Reese had failed to update his instant application to reflect the changes in (b) and (c). See FCC 72–423, *supra*, paragraph 3.

32. Reese testified that his failure to comply with Section 1.65 was an oversight by him and his attorney. By way of mitigation, he stated that the sale of WOPI(FM) and the purchase of WOKJ by Tri-Cities "did not, in any way, affect my financial, technical or other qualifications in Shreveport." He now realizes that the two transactions could have some collateral relation, under the contingent comparative issue, to the instant proceeding.

33. In his testimony Reese acknowledged that he was aware of the WOKJ and WOPI(FM) transactions when they occurred.[4] However, he says he was not aware of 1.65's reporting requirements at that time. But his testimony in this regard is somewhat inconsistent. Reese first testified that he did not become aware of 1.65's requirements until September 1971. It was on September 13, 1971 that the Commission sent him a letter and informed him that he was required to update various portions of his application. Later, when he apparently realized that the WOPI transfer was still pending in September 1971 and thus the instant application should have been updated, he changed his testimony and said he did not become aware of 1.65's reporting requirements until the Designation Order was released in May 1972.[5]

34. Reese was also questioned about an application filed by Tri-Cities on April 3, 1972 to acquire an FM station WJMI. Reese says he did not report this filing because he did not think it would affect this proceeding "until such time as the Commission approved or dis-

[4] The agreement to purchase WOKJ was entered into April 30, 1970, and the agreement to sell WOPI(FM) was entered into on May 14, 1971 (Tr. 108, 116). The Commission approved the transactions on March 10, 1971 and November 30, 1971, respectively. (See paragraph 31, *supra*.)

[5] Reese still has not amended his application to reflect the WOKJ transaction.

approved" the application. On August 24, 1972, but only after correspondence with the Broadcast Bureau, Reese filed a Petition for Leave to Amend to show that Tri-Cities on July 31, 1972, received Commission approval to sell standard broadcast station WOPI.

Issue 6—Bossier Broadcasting's Suburban Community Issue

35. In specifying a Suburban Community issue against Bossier Broadcasting, the Commission pointed out that although Bossier Broadcasting had specified Bossier City (population—41,595) as its specified station location, its proposed 5 mv/m contour would completely envelop Shreveport (population—182,064). In fact, Bossier Broadcasting's proposed 12.5 mv/m contour covers all of Shreveport. Thus, it is not simply a matter of 5 mv/m *penetration*. Rather, it is a problem of total 5 mv/m coverage.

36. Bossier Broadcasting's proposed transmitter site is located on the western edge of Bossier City at the Red River just across from Shreveport.

37. Bossier Broadcasting failed to appear at the July 6, 1972 prehearing conference. At that conference the complexities of the Suburban Community evidentiary showing were discussed. The Bureau noted that in order to properly resolve the issue, the Judge should have before him, *inter alia*, (a) a full 307(b) breakdown of Bossier City and Shreveport; (b) firsthand evidence (interrogatories) from existing aural services to reflect the extent to which such other stations are or are not meeting the needs of Bossier City; (c) a proposed program analysis; (d) a breakdown of Bossier Broadcasting's anticipated first-year revenues by sources; (e) an urbanized area map of the Shreveport area showing both the Bossier City and Shreveport main business districts along with the proposed 5 and 25 mv/m contours; and (f) a breakdown of the 2 mv/m and 5 mv/m populations into those located in Shreveport, those located in Bossier City and those located in urban areas other than Bossier City or Shreveport. In the Order after the conference previously referred to, the Administrative Law Judge called Bossier Broadcasting's attention to the evidentiary requirements previously alluded to at the conference, and the Section 307(b) Policy Statement, 13 FCC 2d 391. Bossier Broadcasting failed to submit any of that evidence.

Sub-Issue 6(a)—Separate and Distinct Programming Needs

38. Bossier Broadcasting submitted no demographic data on either Bossier City or Shreveport. Accordingly, it is impossible to determine whether the specified station location (Bossier City) has needs which are separate and distinct from those of Shreveport. In fact, the only testimony that Bossier Broadcasting offered on the subject was a brief statement by one of its partners, Joel Wharton, who assumes that there is a need for a separate Bossier station based on interviews he conducted under Section IV of the application. Moreover, he admitted that the Section IV survey was taken prior to the designation of the Suburban Community issue and that he conducted no interviews subsequent to the filing of the Bossier Broadcasting application to determine if Bossier City had needs which were separate and distinct from those of Shreveport. Thus, it cannot be determined that Bossier Broad-

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casting has ascertained that Bossier City has separate and distinct programming needs from those of Shreveport.

Sub-Issue 6(b)—Extent to Which Bossier City Needs Are Met by Existing Stations

39. Under sub-issue 6(b), Bossier Broadcasting was charged with showing the extent to which the needs of the specified station location (as determined under 6(a)) are being met by existing aural broadcast stations. The applicant submitted no firsthand evidence on the subject. It made no attempt to either send out the customary written interrogatories or to take depositions. It did nothing. In fact, Joel Wharton concedes that all the Shreveport stations are capable of providing aural service to Bossier City, of which there are seven AM stations in Shreveport, four FM stations in the same city, and one FM station in Texarkana.

Sub-Issue 6(c)—Bossier Broadcasting's Program Proposal

40. Bossier Broadcasting submitted neither a program proposal nor a program analysis. Accordingly, it also failed to relate its proposed programs to any separate and distinct needs that were not being met by other stations. The only statement that could conceivably be related to the issue involved is the applicant's general statement that it plans to provide special program service in case of emergencies in Bossier City.

Sub-Issue 6(d)—Projected Revenues

41. Although asked to submit a projected breakdown of its anticipated first-year revenues, Bossier Broadcasting failed to do so. Thus, it is not possible to determine whether the applicant will derive its income from Bossier City, its station location, or from Shreveport, the major city in the area. Instead Wharton *assumes* that Bossier City businessmen will show a preference for a Bossier City facility that will program to its needs as opposed to the needs of the Shreveport metropolitan community. However, as previously noted, Wharton has submitted no factual data to support his assumption.

42. Wharton estimates that businesses in Bossier City supply about one-third of the advertising revenue for Shreveport stations, but no factual support for such an estimate was submitted.

Issue 7—Local Transmission Area

43. Under Commission precedent Bossier Broadcasting was required to elect whether it would prosecute its application for Bossier City or whether it would amend and seek to qualify as a Shreveport applicant.

44. Since Bossier Broadcasting was absent from the July 6, 1972 prehearing conference, it was unable to make the election then requested by the Bureau. However, Bossier Broadcasting's application has always been for a permit to construct and operate a station in Bossier City. It has never amended its application to specify any other place. Thus, Bossier Broadcasting fails to qualify as a Shreveport proposal, and has failed to overcome the presumption that it realistically proposes to serve that community. *Policy Statement on Section 307(b)*, 2 FCC 2d 190; 13 FCC 2d 391.

Issue 8—Section 307(b) Considerations
Reese

45. The city of Shreveport, located in northwest Louisiana, has a population of 182,064 distributed over an area of 80.286 square miles. Shreveport is also the principal city of the Shreveport Standard Metropolitan Statistical Area (SMSA) which has a population of 294,703. The city's Black population comprises 34% of its total population while 32.8% of the population in the Shreveport SMSA is Black.

46. Shreveport is of great importance to the nation's natural gas and oil industries. It is the center of one of the greatest oil and gas producing areas in America, and is headquarters for one of the country's largest gas transmission companies. The city is also a center for the manufacturing industries including lumber, metals, machinery and food. 16,600 persons are employed in these industries. Shreveport's non-manufacturing industry includes gas, oil, construction, wholesale and retail trade, services and agriculture. A total of 83,950 are employed in these industries with 6,850 persons engaged in agriculture. Some of the most recent acquisitions to Shreveport's industrial family have been General Electric, Western Electric, Bingham-Williamette, and the Ford Motor Company. Many of the long-time Shreveport manufacturing residents have announced, commenced or recently completed expansion programs.

47. Shreveport is also a center for wholesale and retail trade in the Southwest with more than 2,000 major retailers, including 34 shopping centers. Retail trade employs 16,125 persons while 7,500 persons are engaged in wholesale trade.

48. From an educational standpoint, Shreveport is rapidly growing into a center for education. There are presently six colleges in Shreveport. There are 77 elementary and secondary schools and 35 private schools in Caddo Parish wherein Shreveport is located. The Shreve Memorial Library System is comprised of the main library, 23 branches and four bookmobiles. Nine branches and three of the bookmobiles are located within the city limits.

49. Shreveport is served by four means of transportation—rail, highway, bus and airplane. Six railroad companies service Shreveport. Bus service is furnished by 56 arrivals and 56 departures a day. Airline service is furnished by four airlines with 45 flights daily. Fourteen major regular route motor carriers of general commodities operate from Shreveport and over 4,000 communities can be served from the city by one-line haul; these include Boston, Miami, Chicago, Denver and Los Angeles. Every major center within 300 miles of Shreveport can be served by single line overnight.

50. Shreveport has extensive cultural activities. Art, music, the theatre and libraries are all supported by the local populace. The Louisiana State Exhibit Museum, the R. W. Norton Art Gallery and the R. S. Barnwide Memorial Garden and Art Center are all located in the city. In addition, numerous art exhibits are hosted by the Shreve Memorial Library, Centenary College Library, the Louisiana Artists Association, private galleries and commercial retailers.

51. The Shreveport Symphony presents monthly concerts during the symphony season. Two concerts with internationally known artists,

ballet, opera and choral work are presented. The symphony also gives youth concerts in the schools. The Community Concert Association in Shreveport presents four or five outstanding concerts per year including major symphony orchestras, metropolitan opera stars and famous instrumentalists. In addition, there are presentations made by the Shreveport Civic Opera Society, American Guild of Organists, Centenary College and the Shreveport Chorale Ensemble.

52. Shreveport has several local threatre groups. The Shreveport Little Theatre, Port Players, Gaslight Players, Rivertown Players, Burn Dinner Theater and Variety Attractions, Inc. present numerous productions of every description each year.

53. Reese has surveyed the area through interviews and expects to program to meet those needs and to staff with Shreveport residents with experience at the management level.

Dowd

54. Dowd offered no evidence on the Section 307(b) issue, other than brief 1970 population statistics of Vivian (4,046) and Caddo Parish (230,184). This was by design, rather than oversight, in the light of counsel's response to an inquiry by Bureau counsel as to the submission of Section 307(b) demographic data, which Dowd counsel did not consider to be "edifying" (Tr. 136).

Issue 9—Contingent Comparative Issue

Reese

55. Since Mr. Reese's initial involvement in broadcasting as an announcer in 1945, he has held managerial positions including responsibility for hiring of personnel, development of programming and sales.

56. In 1954, Reese joined The Skyline Radio network as manager of WTUP, Tupelo, Mississippi. Presently, he owns 27.27% of the stock and is vice president and a director of E. O. Roden and Associates, which operates WGCM and WTAM–FM in Gulfport, Mississippi, and owns 27.27% and is a director (but not officer) of Tri-Cities Broadcasting Company which operates WTUG, Tuscaloosa, Alabama; WBOP and WBOP–FM, Pensacola, Florida; and WOKJ, Jackson, Mississippi.

57. When E. O. Roden and Associates purchased WGCM, Gulfport, Mississippi in 1958, Mr. Reese moved to Gulfport to manage the operation. He has served as general manager since. As he has been throughout his past, Mr. Reese continues to be deeply involved in community affairs. He has served in many important civic and professional activities in Gulfport and in state-wide organizations.

58. Reese will continue to manage the two Gulfport stations, but as the stations are well staffed and capable of operating with limited supervision, he will spend "considerable time" in Shreveport although the exact extent is not disclosed.

Dowd

59. Dowd, a minister, is owner and manager of KNCB, and owns no other radio, television, newspaper or other communications media

interests. His demise, however, has rendered even this meager showing void; the record is, of course, silent as to the usual comparative factors (1 FCC 2d 393) as they relate to Ruby June Stinnett Dowd, the Executrix, or R. S. Dowd to whom a half interest has been devised.

CONCLUSIONS

1. Not having met any of the issues specified, the application of E. S. Sterling, Joel E. Wharton and Dr. T. J. Taliaferro, d/b as Bossier Broadcasting Company, must be denied and excluded from further consideration.

2. The Reese proposal would serve Shreveport and its environs, 343,421 persons in an area of 4,236 square miles within its predicted 0.5 mv/m contour and 279,215 persons in an area of 1,276 square miles within its 2.0 mv/m contour.

3. Within the 0.5 mv/m contour of the Reese proposal, four stations provide 100% coverage; six provide 75% to 95% coverage; five provide 25% to 49% coverage; and nine provide 0% to 24% coverage.

4. The Dowd proposal would serve, from Vivian, Louisiana, 250,472 persons in an area of 3,688 square miles within its 0.5 mv/m contour representing a gain over present KNCB coverage of 186,534 persons and 1,211 square miles. Over 80% of the gain in persons is located in Shreveport (55.8% of which is included), and suburban Bossier City (100%) and Cooper Road (100%). If the Dowd proposal is granted, KNCB coverage would be increased by 292% in population and 50% in square miles.

5. The overlap of Dowd's proposed gain area and Reese's proposed primary service area creates a common area to both including an urban population of 152,340 of which 101,711 reside in Shreveport, 41,595 reside in Bossier City, and 9,034 reside in Cooper Road. The rural population of the common area is 18,552. The common area represents 91.6% of the population and 56.3% of the area Dowd would gain, and 49.8% of the population and 16.1% of the area Reese would serve.

6. From the foregoing, the Broadcast Bureau concludes that Section 307(b) considerations are not determinative, while both Reese and Dowd contend the ultimate decision lies in that issue. None supports its position with citations to Commission precedent.

7. Vivian, the location of Dowd's transmitter, is a small rural community of slightly over 4,000, about 30 miles distant from Shreveport. Its proposed change of frequency, though not of power, with better propagation characteristics and an improved antenna system will produce a gain area consisting primarily of Shreveport and its environs, especially in terms of population to be served. The record is totally silent as to what advantages or benefits might accrue to the residents of Vivian and its environs from the extension of the KNCB signal into the urbanized and industrialized area of Shreveport; neither can any be imagined or assumed. Dowd's contention simply is that allowing him the change of frequency will enlarge the KNCB coverage by about

double the area and triple the population served, and that it would be relinquishing the present 1600 frequency, that frequency remaining available for future allocation. This, according to Dowd, represents a better distribution under Section 307(b) than the Reese proposal which brings an eighth local standard broadcast facility and twelfth local aural service to a city of less than 200,000, which Dowd considers to be one of the most "over-radioed" cities in the country. The latter comment, of course, applies to Dowd's own proposal inasmuch as the vast majority of his proposed gain in population served is Shreveport and its environs.

8. The Reese proposal, sited in Shreveport, is designed to serve that community, although it would also include outlying areas, including Vivian, to which it will bring in additional service, unlike the Dowd proposal. While numerous services now exist in the Shreveport area, there is nothing to indicate excessive coverage and, in fact, the frequency in question was formerly occupied by Station KANB in that city.

9. The Bureau contends that there are no Section 307(b) considerations accruing to Dowd's proposal, and that "no substantial transmission outlet benefits" accrue to Reese; and that hence Section 307(b) considerations are not determinative. The basis of this contention is not stated, nor any Commission precedent on the point cited. If Vivian were suburban to Shreveport, Dowd would be faced with the presumption that he was realistically proposing to serve Shreveport rather than Vivian. *Policy Statement on Section 307(b)*, 2 FCC 2d 190. Having offered no evidence to show that he proposed to serve ascertained needs of either Vivian or Shreveport, his proposal would fail under that standard. That same principle militates even more strongly against the Dowd proposal when it is considered the transmission will be from a small community 30 miles away and yet 80% of the reception gain area of the proposal will be in Shreveport and its environs. Again, no evidence of any sort has been offered to show benefit to either Vivian, the specified community, or to Shreveport, the primary gain area.

10. It is, therefore, concluded that the Reese proposal would provide a more fair, efficient and equitable distribution of radio service.

11. Even if Section 307(b) considerations were not determinative, a comparison on the basis of the standard comparative issues favors the Reese proposal. While Reese suffers a comparative demerit with respect to his Section 1.65 failures, will not be fully integrated into management, will be on a non-resident basis, and does have other communications media interests, nevertheless, the record is silent in this regard with respect to the new owners of the Dowd proposal.

ULTIMATE CONCLUSION

12. For the foregoing reason, it is concluded that the public interest will be served by the granting of the Reese application, and the denial of the Dowd and Bossier Broadcasting applications.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of James E. Reese, Docket No. 19507, File No. BP–18318, is GRANTED, and the applications of Ruby June Stinnett Dowd, Executrix of the Estate of Alvis N. Dowd (KNCB), Docket No. 19508, File No. BP–18369, and of E. S. Sterling, Joel E. Wharton and Dr. T. J. Taliaferro, d/b as Bossier Broadcasting Company, Docket No. 19509, File No. BP–18507, are DENIED.

FREDERICK W. DENNISTON,
Administrative Law Judge,
Federal Communications Commission.

F.C.C. 74-76

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
KAISER BROADCASTING CO., OAKLAND, CALIF.
Concerning Request for Declaratory Ruling Authorizing Telecast of Program-Length Commercials

JANUARY 23, 1974.

KAISER BROADCASTING CO.,
Kaiser Center,
300 Lakeside Drive,
Oakland, Calif. 94604

Gentlemen: This refers to the "Request for Declaratory Ruling Authorizing An Experiment in the Telecast of Program-Length Commercials," filed by your counsel and dated September 20, 1973.

Your request for the declaratory ruling seeks the Commission's approval of a proposal to "experiment by devoting a limited amount of time to programs" which would constitute program-length commercials under the Commission's policies. You state that Kaiser Broadcasting Company and those corporations in which it has substantial interests are licensees of seven television stations all of which are independent UHF stations. The proposed "experiment," you note, would include programming in six relatively distinguishable areas, namely "Product and Merchandise Shows * * * Instructional Programs * * * Travel Programs * * * Classified Advertising * * * Demonstration Programs * * * Auctions." You state that this list is not intended to be all-inclusive but only exemplary, and that conceivably other programming might be developed, produced, and broadcast provided that your proposal receives Commission approbation and proves otherwise feasible. The proposed experiment is premised upon the belief that certain programs which otherwise would be considered program-length commercials possess a sufficient amount of public interest quality to justify their broadcast and that in no case will such programming be presented in more than ten per cent of the licensees' stations broadcasting time.

In support of your petition, you cite various economic and programming problems which you assert are common to independent, nonnetwork UHF stations, particularly with respect to programming in the early and midmorning hours. You argue that if approved by the Commission the experiment would "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. § 303(g)) since the additional programming resulting from the Commission's approval would increase the use of the frequencies assigned to Kaiser's

stations, particularly during those pre-noon hours which are currently unused. You contend that although any given program may prove to be a program-length commercial under the Commission's definition, the mass media serve a public interest function to their viewers by presenting such product and service advertising. You state:

> Advertising can provide the public with varying degrees of information, instruction and entertainment. In a free enterprise economy, moreover, it is wholly proper for individuals and business firms (large and small) to seek to promote the sale of goods or services. It is equally proper for communications media to aid them in that effort.

You characterize the thrust of the Commission's policy statements on program-length commercials as follows:

> The objection to program-length commercials, as we understand it, is that broadcast frequencies have been allocated to programming—rather than advertising—services. The distinction is by no means precise * * * The thrust of the Commission's policy, however, is to distinguish between communications in which the primary purpose is to entertain, to inform or to instruct and those in which the primary purpose is to sell. The latter are permitted in the broadcast band on a subordinate basis only, as a means of providing support for the basic program service.

Finally, you state that if the Commission approves your proposal, the licensees' stations will take the following steps to prevent abuse of the exemptions requested:

> (a) Periods during which no programming is currently scheduled will be utilized, or only entertainment programming which is carried on a sustaining basis or for which commercial support is inadequate will be replaced;
> (b) Only programs which reflect the overall public interest would be broadcast and each program will be evaluated on its merits according to that criterion;
> (c) During the course of the experiment the participating stations will conduct surveys to ascertain viewer and community leader reaction to the programming;
> (d) In no case would non-entertainment programming be supplanted;
> (e) And, the stations involved in the experiment would amend their license applications pertaining to the amount of commercial matter that would be broadcast in any hour; log any program that appeared to be a program-length commercial as entirely commercial; and if so ordered by the Commission, identify by an appropriate announcement at the beginning and ending of identifiable program segments those segments which are entirely commercial.

While it is within the Commission's established authority to grant certain requests for experimental programming when the Commission finds that such programming will fulfill the public interest and will encourage the larger and more effective use of radio (*E. Edward Jacobson*, 7 RR 2d 653 (1966)), the Commission must weigh the public interest benefit of the overall proposal and judge its merits according to criteria established under enunciated policies, in this case, the Commission's explicit statements regarding the broadcast of program-length commercials. See, for example, *WUAB, Inc.*, 37 FCC 2d 748 (1972).

The statements in your request indicate that you are, in fact, familiar with the Commission's program-length commercial policies. Indeed, the basis of your proposed experiment contemplates the broadcast of program-length commercials during the stations' morning time segments which are now unused or during those morning hours when the stations program on a sustaining basis or with little amounts of commercial support.

In our Public Notice entitled "Program-Length Commercials", 39 FCC 2d 1062, 26 RR 2d 1023 (1973), we stated that "the broadcast of [program-length commercials involves] a serious dereliction of duty on the part of the licensee," a dereliction serious enough, in the Commission's view, to warrant the imposition of sanctions in order to bring about discontinuance of such programming. 39 FCC 2d at 1063, 26 RR 2d at 1025. The Commission's statements in that Public Notice articulated policies designed to ensure that Commission licensees would operate their assigned channels and frequencies in the public interest.

It should be noted, in this regard, that five of the six program types forming the basis of your proposed experiment are similar to programs found by the Commission to violate its program-length commercial policies.[1] As our Public Notice stated, the broadcast of program-length commercials, on its face, violates Commission policy and causes the Commission grave concern that programming in the interest of the public is being subordinated to programming in the interest of salability of a sponsor's products or services. Even though Kaiser proposes procedures which it believes will prevent abuse of the requested exemption, the fact remains that any program broadcast which is entirely commercial would violate the Commission's policies against the broadcast of program-length commercials, since by definition the broadcast of program-length commercials violates the licensee's duty to operate its channels in the public interest. See, Public Notice, "Program-Length Commercials, *supra*.

As for the instructional or entertainment value of programs such as are proposed by the petitioner, the licensees are free to present programs of such types if they find the public interest to be served thereby and if the presentation of them does not violate our program-length commercial policies. Thus, there is nothing in our policies to prohibit presentation of instructional programs, travel programs, demonstration programs, auctions, or even "products and merchandise shows," provided our stated policies are adhered to. We also note in a Public Notice being released this date that an exemption from our policies is warranted for "swap shop" and "classified ad" programs on a limited basis in accordance with the policies set forth in that Notice. See, "Applicability of Commission Policies on Program-Length Commercials," at 5–6 and example 29 (Mimeo No. 07640).

Finally, to grant your request on the basis that the stations would attract additional commercial and economic support and thus be able to make greater use of the channels assigned them during the pre-noon hours would establish exceptions which would justify other licensees in seeking exemption from the Commission's program-length commercial policies and prevent those policies from being administered in an even-handed, consistent manner. In fact, it appears likely that our policies on this subject would, for all practical purposes, become unenforceable if we were to grant exemptions of the kind sought here.

An additional matter raised by you in your request deserves brief attention. You stated in your application that one basis generating

[1] See, for example, *Weigel Broadcasting Co.*, 41 FCC 2d 370, 374 (1973) (Product and Merchandise Show); *Multimedia, Inc.*, 25 FCC 2d 59 (1970) (Instructional Program); *Columbus Broadcasting Company*, 25 FCC 2d 59 (1970), *WFIL, Inc.*, 38 FCC 2d 411 (1972) (Travel Programs); *WUAB, Inc.*, 37 FCC 2d 748 (1972) (Classified Advertising); *Taft Broadcasting Co.*, 39 FCC 2d 1070 (1973) (Demonstration Program).

your request for declaratory ruling was that the Commission's policies in this area are not precise and that difficulties arise when licensees seek to evaluate a program vis-a-vis the Commission's statements regarding program-length commercials. We are issuing a Public Notice wherein the Commission explains its program-length commercial policies and sets forth hypothetical examples as guidelines.

On January 3, 1974, the Association of Independent Television Stations, Inc. (INTV), filed a memorandum in support of Kaiser's request for waiver of the Commission's program-length commercial policies. INTV's arguments generally raise considerations and points of law similar to those detailed in the text of this decision and the concurrently-issued Public Notice, "Applicability of Commission Policies on Program-Length Commercials." INTV asserts, in addition to its other arguments, that the Commission's program-length commercial policies, particularly the objective test which defines a program-length commercial as any program which interweaves non-commercial program matter with commercial promotions for a sponsor's products or services, are vague and arbitrary, and, as applied, constitute an unlawful suppression of legitimate program matter in violation of First Amendment principles and Section 326 of the Communications Act. INTV also states that the Commission's policies effectively limit a licensee's "profit motive" to present certain types of sponsor related programming. The Commission believes that INTV's arguments in this regard are unfounded and hence do not present any substantial reasons for amending the program-length commercial policies as previously applied or as set forth in the Public Notice issued this day. Those policies neither prohibit the broadcast of commercial announcements nor restrain the broadcast of that speech which finds protection in the First Amendment or Section 326 of the Communications Act of 1934. Rather, those policies primarily establish criteria which define commercial matter, and determination of what is commercial matter has always been implicit in the Commission's Rules and policies regarding the broadcast and logging of commercial matter. The criteria set forth in the Public Notice further remove any suggestion that the application of the Commission's policies will prove arbitrary or otherwise exceed the Commission's legitimate administrative discretion. In this regard, and as INTV apparently concedes, the courts have held that commercial speech which is clearly and solely designed to promote commercial products or services does not find the same broad First Amendment protection as non-commercial forms of speech. *Banzhaf* v. *FCC*, 405 F. 2d 1082 (D.C. Cir. 1968), *cert denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 844 (1969); *Valentine* v. *Christenson*, 316 U.S. 52 (1941).

In view of the foregoing, we are constrained to deny Kaiser's request for a declaratory ruling that would in effect constitute an approval of your stations' broadcast of program-length commercials.

Commissioner Hooks concurring in the result.

By Direction of the Commission.
Vincent J. Mullins, *Secretary.*

F.C.C. 74–161

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KSAY BROADCASTING CO. (ASSIGNOR) AND SAN FRANCISCO WIRELESS TALKING MACHINE CO. (ASSIGNEE) For Commission Consent to Assignment of License for Radio Station KSAY–AM, San Francisco, Calif.	File No. BAL–7911

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 19, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING.

1. We have before us for consideration: (1) the above captioned assignment of license application, accepted for filing on June 28, 1973; (2) a Petition to Deny the subject application filed on July 27, 1973 by the Community Coalition for Media Change of the San Francisco Bay area (hereinafter "Coalition")[1]; (3) a joint Opposition filed August 13, 1973 by both parties to the subject application; and (4) a Reply pleading filed August 20, 1973 by the Coalition.[2]

2. Station KSAY–AM is a daytime only operation at 1010 kHz with power of 10,000 watts. The station has been licensed to the assignor since July 31, 1968 (see file number BAL–6417) and, as will be more fully discussed below, KSAY's license renewal application has been deferred since December, 1971. The total consideration for the subject assignment includes $900,000 for the station's assets, $238,440 for a twenty year consulting agreement, and $44,000 for a two year covenant not to compete; totalling $1,182,440. The assignee's parent, Pacific FM, Inc., is also the licensee of radio Station KIOI–FM, San Francisco, California.

3. The Petition to Deny questions not only the qualifications of the assignee to operate KSAY based on the assignee's operation of KIOI–FM, but also the assignor's operation of KSAY. Generally, the Petition claims the employment practices of both KSAY and KIOI–FM do not conform to our rules and alleges that both stations' public affairs programming is greatly deficient in dealing with the major social issues in San Francisco. Finally, the Petition alleges *ex parte* violations by the assignee, bad faith in negotiations with the Coalition,

[1] See discussion below on the timeliness of the petition's filing.
[2] On September 5, 1973, the Coalition filed a "Supplement" to their Reply addressing the issue of the Petition's timeliness.

and requests $10,000 reimbursement of expenses from the assignee for the Coalition for its consulting services. These matters will be discussed separately below.

4. Initially, the parties to the subject application question the timeliness of the Coalition's Petition and challenge their standing to file said Petition. With regard to standing, Petitioner states:

> The petitioner, Community Coalition for Media Change, has been concerned with and actively involved in upgrading minority representation in all aspects of San Francisco Bay Area community life. The petitioner is representative of all minorities in the San Francisco area and is especially concerned with their economic, social and psychological development. (Pet. p. 3)

Petitioner also states that persons they represent reside within the KSAY–KIOI–FM service area and are regular listeners to same. The Coalition is a non-profit organization under the laws of California. The parties in their Opposition contest petitioner's standing by stating that

> Mere listener status does not confer standing, nor does the general class of representation, absent facts as where the Coalition was formed, what its official existence is, who its members are or how their interests would be adversely affected. (Opp. p. 3)

5. Section 309(d)(1) of the Communications Act of 1934, as amended, provides that "(a)ny party in interest may file * * * a petition to deny any application." 47 USC § 309(d)(1). It was firmly established in *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) that any responsible representative of the listening or viewing public in the area in which the station is located has standing. Whatever the precise boundaries of standing, this case presents no substantial issue on that question.

6. The Coalition, in 1971, filed Petitions to Deny against the renewal applications of seven San Francisco broadcasting stations. Those pleadings which are pending before the Commission contain additional descriptive material regarding the identity and activities of the Petitioner as follows:

> The Community Coalition for Media Change, * * * is an unincorporated association representing over 15 functioning local community organizations, whose affiliated national state, and local groups number over 100. The Coalition unites religious, educational, legal, community action, and labor groups. The purpose of the organization is to involve minority (Black, Asian, and Latin-American) citizens from the San Francisco-Oakland Bay area in the electronic media. The Coalition has been working for the inclusion of minorities and minority views on all Bay Area broadcast stations. (Petition to Deny the renewal of license for KFRC–AM and KFMS–FM, San Francisco, Calif. p. 3, filed November 1, 1971)

Accordingly, we find that the Petitioner has standing as a party in interest under Section 309(d)(1) of the Communications Act of 1934, as amended.

7. The applicants contend that the petition did not come into compliance with the requirements of the Communications Act until July 31, 1973 and, therefore its filing is untimely.[3] The petition was

[3] The subject application was accepted for filing on June 28, 1973, and accordingly the thirty day period within which to file a Petition to Deny expired July 30, 1973.

timely filed with the Commission on July 27, 1973, but was not accompanied by a Certificate of Service. Such certificate was subsequently filed with the Commission in a letter dated July 30, 1973. After the Certificate was sent to the Commission, the Coalition learned that its petition had not in fact been served on the parties and accordingly the petition was mailed to the applicants by regular mail from Washington, D.C. on July 31, 1973, and was received by the applicants on August 3, 1973. Our Rules applicable to Petitions to Deny provide in Section 1.47(g) that the Certificate of Service need not be filed at the same time as a petition is filed: "The Commission may allow the proof [of service] to be * * * supplied at any time unless to do so would result in material prejudice to a party." Section 1.47(b) provides that service of the petition must be made on the parties "on or before the day on which the document is filed" with the Commission. Finally, Section 1.47(f) provides that if service to the parties is to be made by mail over a distance of more than 500 miles, service should be by air mail. Here the Certificate of Service was not filed with the petition on July 27, 1973 but was subsequently submitted to the Commission [4] and service of the petition on the applicants was made four days later by regular, rather than air mail. While Petitioner's late service obviously did not comply with the technical filing requirements of our rules, the applicants have made no allegation or showing that this late service was in any way prejudicial to them. Had it been, they certainly could have requested additional time within which to file their Opposition pleading. We therefore hold that the Petitioner's late service, amounting to a few days delay in service upon the applicants, does not render the petition procedurally defective as untimely. Accordingly, the applicants' request that the petition be dismissed as untimely is denied.

EMPLOYMENT

8. Petitioner alleges and the parties do not dispute the fact that the San Francisco area's minority population comprises 28% of the total population. Given the multi-racial character of the market, the Coalition contends that, with no minorities and only one woman at KSAY–AM and only one Black clerical female at KIOI–FM, both stations' minority employment records are deficient. Petitioner alleges that no efforts have been made at either station to recruit minority employees other than in clerical positions and, regarding KIOI–FM, the result has been that minority persons who have been hired never lasted for more than six months. Concerning KSAY–AM, the Petitioner states that it "has reason to believe" that employee turn-over during the past three years provided opportunity for minority hiring but "no effort [was made] to hire minority persons." (Reply p. 5). Also the Coalition "doubts the veracity of KSAY's claim" that it had a Black part-time engineer who has since left the station and presently cannot be located. Turning to KIOI–FM, the Coalition alleges that the assignee maintains a "very anti-minority hiring and employment

[4] While Petitioner's letter accompanying the Certificate of Service was dated July 30, 1973 and the envelope post-marked July 27, 1973, this apparent discrepancy is not of any decisional significance.

policy, using minorities as statistical tokens." (Pet p. 2). Petitioner contends that the one minority employee at KIOI–FM (Black female) sits at the front door of the station as a "token" clerical worker whose background includes national level promotional experience but who was denied a "Promotion Manager" position at the station which had become vacant and was given instead another clerical position in the traffic department. The Coalition further alleges that this Black female considered herself to be a "token" at the station and that her salary was $100 more per month than would normally be paid a person in her clerical position to insure her continued employment at the station. The Coalition alleges that no "effective efforts" are being made by the assignee to hire Blacks at KIOI–FM in other than clerical positions. While the assignee points out that four minority persons are currently employed at KIOI–FM, the Coalition disputes this fact and requests the names and positions of said persons.

9. The applicants in their Opposition urge the Commission not to give any weight to the unsupported general allegations of the petition that either station has ever engaged in discriminatory hiring practices. Both parties argue that Petitioner has failed to raise any substantial or material questions of fact surrounding the employment record of either station and contend that the Coalition's charges of equal employment rule violations are "untrue and spurious." In an affidavit signed by Stanley Breyer, General Manager of KSAY–AM, it is pointed out that the KSAY staff has been declining with only one full time professional hired since 1970. This position was filled in July, 1971 by a white male who possessed the required first class license and the familiarity with producing a country and western music program. In non-professional positions the affidavit continues, an offer was made by KSAY–AM to a Black female in February, 1973 who declined the offer "because she did not like the area where the KSAY office was located." Finally, the affidavit states that a Black part-time engineer, Charles E. Taylor, who worked for KSAY–AM from November 15, 1970 to January 15, 1972, left the station without notice and cannot now be located.

10. In an affidavit filed by James Gabbert, President and controlling owner of KIOI–FM and President of the assignee corporation, it is pointed out that actually only three persons were hired during the past two years: an account executive; an on-the-air person; and a traffic director. Mr. Gabbert states that these three positions were filled after KIOI–FM contacted the area Broadcast Skills Bank, various area colleges having broadcast programs, a Black community leader and existing minority staff members. Mr. Gabbert stresses the fact that these hiring procedures are followed "in each instance that it intends to hire personnel." Mr. Gabbert also states that KIOI–FM's training program is currently filled with a Chicano male and that another Chicano male is tentatively scheduled to begin training. Since the filing of its last Form 395 (Annual Employment Report) on March 31, 1973, KIOI–FM has hired or promoted five minority employees, all in non-clerical positions. Mr. Gabbert concludes by stating that "to the best of affiant's knowledge and belief, no minority employee has ever been terminated or employed for less than six months at

KIOI–FM." He points out that during the last three years ten minority persons have been employed by the assignee and six of them are presently employed at KIOI–FM.[5]

11. On the issue of equal employment by either licensee, we remain unpersuaded by the Coalition's allegations. Congress was quite clear when it required that Petitions to Deny contain "specific allegations of fact sufficient to show * * * that a grant of the application would be prima facie inconsistent with" the public interest. 47 USC § 309 (d) (1) [6] With respect to assignor's equal employment practices at KSAY–AM, while the station presently has no minority employees, the station's staff has declined from eleven to seven over the past three years, only two persons have been hired during this period and there are no complaints or evidence before us of discriminatory employment practices. In these circumstances, we conclude that there are no substantial and material questions regarding assignor's employment practices which would preclude a grant of the application.

12. With respect to assignee's equal employment practices at KIOI–FM, while the Coalition cites one specific instance of an alleged discriminatory employment practice, the very person believed by Petitioner to have been discriminated against by assignee, rebuts this allegation in an affidavit attached to the Opposition. Although the figures with respect to minority group employment submitted by the parties in the Opposition were controverted by Petitioner, the Coalition's allegations remain unsupported by affidavit by a person with personal knowledge of the situation. The assignee, by affidavit of Mr. Gabbert, has disputed the Coalition's allegations. The information before us indicates that minority persons have been accorded equal employment opportunities at KIOI–FM with respect to clerical and non-clerical positions and that the licensee has a training program for minority applicants. Based upon all of the information now before us, including the affidavit of Mr. Gabbert, the Form 395 Annual Employment Reports for KIOI–FM and the supplementary information filed on January 28, 1974, we have determined that assignee has, indeed, made good faith efforts to implement a positive continuing program of specific practices designed to assure equal employment opportunities for minority groups and women at KIOI–FM. Accordingly, assignee's employment practices at Station KIOI–FM raise no issue regarding its qualifications to acquire Station KSAY–AM. Assignee has proposed a program of specific practices to assure equal employment at KSAY–AM which includes:

(1) the utilization of Broadcast Skills Bank in selecting minority employees. Assignee states that its President, Mr. Gabbert, is a director of the Broadcast

[5] Those persons are: (1) Cheryl Baker—Black clerical employee for more than eight months before leaving; (2) Don Yamate—Asian account executive who was employed for one year and then hired by KPIX–TV; (3) Orlando Parnam—Black part-time reporter hired to cover the Angela Davis trial; (4) Larry Maynard—Black newsman who is now sports anchorman at KCRA–TV, more than six months at KIOI–FM; (5) Leora Johnson—Black female currently on-the-air, to become Community Liaison Director; (6) Ed Mabaloc—Asian technical employee for more than one year; (7) Al Betines—Asian account executive for more than six months; (8) Sandra King—Black female traffic director; (9) and (10) Rod Sanden and Ron Rodriguez—Chicano males in the KIOI–FM training program.

[6] See also *Chuck Stone* v. *FCC*, 466 F. 2d 316, rehearing denied at 331 (D.C. Cir. 1972) and *WTAR Radio–TV Corp.*, 31 FCC 2d 812 (Review Board, 1970).

Skills Bank which "was formed to act as a pool of broadcast skills and talents for minorities in the Bay area.";

(2) the maintaining of contacts with groups likely to provide prospective minority and female applicants, and;

(3) the hiring and training of minority students "from the college and university broadcast major classes" as "part time board engineers."

We are satisfied, based upon assignee's assurances and its past record at Station KIOI–FM, that good faith efforts will be made by assignee to ensure the implementation of a continuing affirmative and positive program of equal employment opportunities at Station KSAY–AM. Accordingly, we have concluded that Petitioner's allegations regarding the equal employment practices at Station KIOI–FM raise no substantial and material questions which would preclude a grant of this application.

PUBLIC AFFAIRS PROGRAMMING

13. Petitioner contends that KIOI–FM and KSAY have done very little to produce public affairs programming that deals with social and racial problems in the San Francisco Bay area. They further argue that the few programs that the licensee's characterize as public affairs are aired at low listener times during the week which results in token public affairs programming. Petitioner contends that programming dealing with racial and other social problems must be directed towards persons "who support, condone and exploit racism" and the programming on KSAY and KIOI–FM has failed to do this. The Coalition faults the assignee for airing a religious program on Sunday evenings that is designed to deal with the lack of communication between the races. Petitioner argues that a religious program is an improper means of communicating social ideas in our contemporary society. Finally, the Coalition alleges that the assignor "has not consulted any black person who could competently determine whether or not the programs in question really helped deal with minority problems." (Reply p. 6)

14. The assignor contends that Petitioner's allegations are inaccurate and lists several typical and illustrative public affairs programs which were designed to meet social and racial problems in the Bay area.[7] The assignee points out that "Petitioner fails to set forth specific allegations of fact, supported by affidavits, to show that KIOI has not made good faith efforts in its programming to meet the community problems that it has ascertained." (Opp. p. 11) Both parties make the point that neither station has ever received an objection to its programming efforts to meet community problems until now. Both licensees argue that it is within their discretion to select material to be broadcast that will meet community problems and that only upon a factual showing of lack of a good faith effort by the licensee should the Commission inquire further. In the present case, the parties argue that Petitioner fails to raise the necessary substantial or material question of fact surrounding the public affairs programming of either station.

[7] "The Black Man and Civil Rights"—weekly program dealing with Black problems in the Bay area; "KSAY Salutes"—twice daily acknowledging achievements and contributions of minority group persons; and "Council for Civic Unity"—weekly program on local discrimination in hiring and employment.

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15. Again Petitioner has substantially alleged general objections unsupported by specific instances of licensee failure to program in the public interest. We have by necessity given licensees wide discretion in programming to meet ascertained community needs. The licensee's good faith judgments in programming matters will be questioned only where there is an apparent abuse of that discretion. *Chuck Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972) *rehearing denied* 466 F.2d 331 (D.C. Cir. 1972) Petitioner's one example for KIOI–FM, "Celebrations" on Sunday evenings from the Glide Memorial Methodist Church, is hardly persuasive. We find that the assignee's selection of religious programming as one means of meeting community needs and problems to have been a reasonable exercise of licensee discretion. The Coalition admits that the program's host, Reverend Cecil Williams, "is a most charismatic and racially aware person" and presumably so does the assignee for they have named him to their Board of Directors. Petitioner's objection to the public affairs programming of KSAY and KIOI–FM cannot be sustained without the benefit of further factual allegations. While we have no disagreement with their conclusions that social and racial problems of a community deserve wide exposure and attention from the licensee, we have not been persuaded that these two licensees have violated their discretion in programming to meet community needs. Accordingly, we find no substantial or material questions of fact surrounding their programming efforts.

ASCERTAINMENT EFFORTS AT KIOI–FM

16. Without mentioning or questioning the ascertainment of community needs conducted by the assignee in the subject application, Petitioner alleges that the ascertainment survey of the assignee for KIOI–FM's 1971 renewal is "grossly" invalid with respect to the minority community of San Francisco. While the Coalition recognizes that the assignee took special measures to fully survey the needs and interests of minority groups in that renewal application, it contends that the "quantity of surveys does not compensate for [the poor] quality of replies." (Pet. p. 6) Petitioner believes that the survey as taken exhibits a bias "in favor of the station" and that the results of the "broad and abstract" surveys fail to reflect minority needs.

17. The applicants respond that Petitioner's allegations regarding the community needs survey conducted in connection with the 1971 application for renewal of license of Station KIOI–FM are untimely with respect to that renewal and raise no substantial questions concerning this assignment application.

18. In granting the KIOI–FM renewal application on November 26, 1971, the Commission determined that the licensee's community needs survey was adequate and consistent with the requirements set forth in its *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650 (1971). We conclude that, with regard to the 1971 KIOI–FM renewal, these allegations are untimely, and that they raise no substantial or material questions concerning the assignee's qualifications to acquire Station KSAY–AM.

EX PARTE VIOLATIONS

19. Petitioner contends that certain discussions that James J. Gabbert allegedly had with FCC Commissioners concerning assignee's negotiations with the Coalition were in violation of the Commission's *ex parte* rules. The Petitioner includes a copy of a letter dated June 22, 1973, which the Coalition sent to Mr. Gabbert in which Mr. Marcus Garvey Wilcher, Chairman of the Coalition, voiced his concern that Mr. Gabbert's discussions at the Commission were in violation of the *ex parte* rules. Assignee in its Opposition contends that whatever discussions may have occurred between Mr. Gabbert and Commission personnel, were not in violation of our *ex parte* rules since those discussions occurred long before the petition was filed and thus before the application became a restricted adjudicative proceeding under Section 1.1203 of our rules. The assignee maintains that discussions similar to those alleged by Petitioner are rather routine in Commission practice.

20. Under our *ex parte* rules, an application for assignment of license or transfer of control of an existing licensee becomes a "restricted adjudicative" proceeding only after a Petition to Deny is filed. Thus communications with the Commission's decision-making personnel prior to that time are not in violation of the rules. Since whatever discussions may have taken place between Mr. Gabbert and Commission personnel, appear to have occurred prior to June 22, 1973, more than a month before the petition was filed, such discussions would not have been in violation of our *ex parte* rules. We hold that Petitioner has failed to raise substantial or material questions of fact relating to improper *ex parte* contacts with the Commission.

MONETARY REIMBURSEMENT

21. With regard to Petitioner's claim that assignee should compensate it in the amount of $10,000 for consultant services and legal fees incurred by the Coalition, we note that Petitioner has made no showing that assignee contracted or agreed with Petitioner regarding the performance of or payment for such services. While we have no objection to licensees reimbursing anyone for services actually rendered in assisting it in the operation of its broadcast facilities (*Heftel Broadcasting-Boston, Inc.*, 42 FCC 2d 1076 (1973)), such reimbursement must be agreed to by the licensee or applicant. Here, there has been no showing that assignee agreed to pay any money to the Coalition nor has the assignee admitted to any such agreement or liability. If Petitioner feels that there is liability for such compensation it should seek its remedy in local courts pursuant to local law. In these circumstances Petitioner's claim for compensation from assignee presents no substantial or material question which would preclude a grant of this application.

TECHNICAL VIOLATIONS

22. Petitioner suggests that the assignor's violations of several technical rules "indicates a pattern of 'lack of concern' " for the public air

waves which should be resolved before the assignee is allowed to operate KSAY. Approval of the assignment under these circumstances, they argue, would amount to the sanctioning of continued rule violations by the assignee.

23. While it is true that KSAY has violated several technical rules of the Commission in the past, it is also true that at present the assignor is attempting to avoid continued violation by moving its transmitter site. At its present location, KSAY's transmitter radiates signals that are reradiated by nearby loading cranes on San Francisco's shipping docks. Since these cranes are not adaptable to de-tuning and since the reradiation can pose safety hazards (especially when explosives are being unloaded), the assignor filed an application (BP–19562) to move its transmitter and avoid further reradiation rule violations. That application will be given approval shortly by the Commission's Broadcast Bureau acting on delegated authority. After full review of the technical history of KSAY, we now hold that no substantial or material question of fact has been raised by Petitioner regarding the past engineering difficulties of the subject station.

Accordingly, in view of the above, IT IS ORDERED, that the Petition to Deny filed by the Community Coalition for Media Change IS DENIED and that, based upon a determination that the applicants are fully qualified and that the public interest, convenience, and necessity would be served thereby, the assignment application for radio Station KSAY–AM, San Francisco, California from KSAY Broadcasting Company to San Francisco Wireless Talking Machine Company IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-159

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: LEESBURG CABLEVISION, INC., LEESBURG, LAKE COUNTY, FLA. For Special Temporary Authorizations	FL065 FL239

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 20, 1974)

BY THE COMMISSION:

1. On October 29, 1973, Leesburg Cablevision, Inc., operator of cable television systems at Leesburg and certain areas of Lake County, Florida, filed petitions for special temporary authority to continue carriage of Television Broadcast Station WTOG (Indep.) St. Petersburg, Florida, on its systems, pending authorization for permanent carriage.[1] The petitions were amended on December 26, 1973, and are unopposed. The systems, as well as a third system at Fruitland Park, Florida, commenced operations in December, 1968. Leesburg and portions of Lake County are located in the Orlando-Daytona Beach, Florida market (#55), but Fruitland Park is located outside all markets.

2. In 1968, Leesburg Cablevision proposed to add WTOG and other signals to its Leesburg and Fruitland Park Systems, and filed a request for waiver of the evidentiary hearing requirements of former Section 74.1107 of the Commission's Rules. The Commission granted the request for waiver and approved carriage of WTOG on the Fruitland Park system in *Leesburg Cablevision, Inc.*, 18 FCC 2d 49 (1969); however, action was deferred on the request insofar as it related to Leesburg, since that portion of the request was inconsistent with the then-proposed rules. Leesburg Cablevision's three systems are served by a common headend, and, when WTOG was supplied to the Fruitland Park subscribers, it was also carried on the Leesburg and Lake County systems. Total TV, Inc., of Janesville, Wisconsin, purchased

[1] Leesburg Cablevision has filed amended applications for certification (CAC-862-864) of its operations at Leesburg, Lake County and Fruitland Park, Florida for the following signals:

WESH-TV (NBC)	Daytona Beach, Fla.
WEDU (Educational)	Tampa, Fla.
WJXT (CBS)	Jacksonville, Fla.
WDBO-TV (CBS)	Orlando, Fla.
WFLA-TV (NBC)	Tampa, Fla.
WFTV (ABC)	Orlando, Fla.
WLCY-TV (ABC)	St. Petersburg, Fla.
WTVT (CBS)	Tampa, Fla.
WMFE-TV (Educational)	Orlando, Fla.
WTLV (NBC)	Jacksonville, Fla.
WUFT (Educational)	Gainesville, Fla.
WTOG (Independent)	St. Petersburg, Fla.
WSWB (C.P.)	Orlando, Fla.

Leesburg Cablevision from Lebhar-Friedman, Inc., of New York, New York, on February 16, 1972.[2] At the time of purchase and for some time thereafter, Total TV states it was unaware of the unauthorized carriage of WTOG. Since then, Leesburg Cablevision has filed applications for certification to bring the systems into full compliance with the rules. Rather than temporarily delete carriage of WTOG, Leesburg Cablevision seeks special temporary authority to continue carriage of WTOG pending action on its applications.

3. Leesburg Cablevision offers several contentions in support of its request for special temporary authorization. Carriage of WTOG on the Fruitland Park system (located outside all markets) is consistent with Section 76.57(b) of the Commission's Rules, and carriage on the Leesburg and Lake County systems (located in a second-fifty market) is consistent with Section 76.63(a) as it relates to Section 76.61(b)(2). No other independent signal is being carried by the systems and only one other is proposed. All interested parties have been notified of Leesburg Cabevision's carriage of WTOG, not only by service of the applications for certification and special temporary authorization, but also by carriage of the signal since 1969. Leesburg Cablevision states that there have been no objections to its carriage, and, in fact, that WTOG has requested carriage on the three systems. In addition, the innocence of Total TV in the illicit carriage of WTOG on the Leesburg and Lake County systems is emphasized. Finally, Leesburg Cablevision contends that the problem presented in this proceeding is *de minimus* because of the small number of subscribers, and the size and location of the market.[3]

4. In the Commission's *Order* of November 21, 1973, FCC 73–1214, 43 FCC 2d 1072, we adopted a procedure to allow cable systems to commence carriage of new "local" television signals or in-state nonlocal educational signals without seeking immediate Commission approval. This procedure however, does not apply to the situation prevailing in Leesburg or Lake County since the two communities are located in a major market and WTOG is a distant independent. Nevertheless, we feel the Leesburg Cablevision petition has merit. In view of the fact that: (a) carriage of WTOG on the Leesburg and Lake County systems is consistent with our rules; (b) temporary deletion would not serve the public interest owing to this consistency; (c) no interested party has objected to temporary or permanent carriage of WTOG; and (d) the ownership of the system has recently changed, we find that the requested temporary relief should be granted. This action conforms to our rulings in other situations in which carriage of particular signals began without proper Commission authorization, yet we determined that the public interest would not have been served by ordering deletion of the signals in question because of the peculiar circumstances attending the unauthorized initiation of signal carriage.[4]

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[2] The "Annual Report of Cable Television Systems" (FCC Form 325) filed for each of the Leesburg Cablevision systems in 1971 and 1972 reflect the change in ownership.

[3] In an October 26, 1973, letter to the Commission, Leesburg Cablevision states that 2,480 subscribers were being served by the three systems.

[4] Some representative rulings are found in *Southern Illinois Cable TV Company*, FCC 73–1274, — FCC 2d —; *Belle Glade Community Television Company, Inc.*, FCC 73–1211, 43 FCC 2d 988; *La Fourche Communications, Inc.*, FCC 73–122, 39 FCC 2d 472; *Coldwater Cablevision, Inc.*, FCC 71–793, 31 FCC 2d 17.

In view of the foregoing, the Commission finds that grant of the petitions for Special Temporary Authorization would be consistent with the public interest.

Accordingly, IT IS ORDERED, That, pending action on applications for certificates of compliance (CAC–862 and 863) filed by Leesburg Cablevision, Inc. for Leesburg and Lake County, Florida, the subject petitions for Special Temporary Authorization ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-87

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
WAIVER OF PART 15 OF THE COMMISSION'S RULES TO RELAX THE TECHNICAL LIMITATIONS IMPOSED ON THE OPERATION OF A LOW POWER COMMUNICATION DEVICE IN THE AM BROADCAST BAND

ORDER

(Adopted January 30, 1974; Released February 13, 1974)

BY THE COMMISSION:

1. By a letter received on October 2, 1972, Victor H. Fischer, Pittsburgh, Pennsylvania, representing himself as the spokesman for a group which calls itself Western Pennsylvania Youth Radio, petitions the Commission to waive the technical restrictions imposed by Part 15 on input power and antenna length permitted for a Low Power Communication Device operating in the AM broadcast band without an individual license. The petitioner desires to furnish a noncommercial educational radio service to his community by using equipment which cannot comply with Part 15.

2. Prior to requesting a waiver of Part 15, the petitioner was illegally operating a six-watt transmitter and carrying on the low power broadcast operation described in his petition. Such operation was the subject of a complaint which was investigated by the Commission's Field Operations Bureau and the petitioner was informed that his operation did not comply with Part 15 and that such operation (without an individual license) was in violation of the Communications Act. As a result of this admonition, the petitioner terminated his operation. The petitioner then sought legal status for his operation, and in a letter to the Commission dated September 5, 1972, requested a license to operate a noncommercial educational community service radio station. The Commission's reply, dated September 15, 1972, informed the petitioner that his proposed operation was not eligible for licensing under any of the provisions set out in the Commission's Rules for a broadcast station. Our refusal of the petitioner's request prompted the filing of the subject petition.

3. Part 15 of our Rules permits operation in the AM Broadcast Band of a miniature transmitter, called a Low Power Communication Device, without an individual license provided that the input power to the device does not exceed 100 milliwatts and that the total length of the transmission line plus the antenna does not exceed 10 feet. In addition, our Rules limit the level of emissions on spurious frequencies,

and the amount of RF energy that may be conducted into public utility power lines. These technical specifications are designed to limit communication range for the protection of authorized radio services from harmful interference, and yet are considered to be sufficiently lenient that a reasonable operating range is provided for a Low Power Communication Device. Moreover, regardless of strict adherence to the technical limitations in Part 15, a Low Power Communication Device is permitted to operate on a sufferance basis only, and in the event harmful interference is caused to any licensed radio station, operation must cease promptly. Because of this overriding noninterference condition and the severe technical limitations imposed, Part 15 cannot be used to provide a regular broadcasting service.

4. In essence, the petitioner proposes that the Commission suspend the technical limitations in Part 15 to permit him to carry on a nonlicensed operation providing coverage and service that would resemble a regular broadcast operation. Because relaxation of the technical specifications and operating conditions set out in Part 15 would greatly increase interference potential to the regular broadcast service, the Commission has not granted such requests as the petitioner's in the past. The intent of Part 15 is to provide the radio enthusiast with an opportunity to experiment with radio, and to entertain friends or neighbors within a very limited communication range. The Commission never intended that Part 15 be used to establish a low power broadcast facility to service an entire community.

5. In support of his request, the petitioner sets out the technical requirements for his proposed operation, and merely states that interference will not be caused. The petitioner has offered no information or technical data to justify waiver of our rules; moreover, there is no showing how the public interest would be served if the restrictions in Part 15 were suspended to permit the petitioner to carry on his proposed operation.

6. The Commission is not convinced that grant of the petitioner's request is either justified or appropriate. Accordingly, IT IS ORDERED, That the petitioner's request for waiver of Part 15 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R-1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of MARSHALL W. ROWLAND, WEST PALM BEACH, FLA. For Construction Permit	Docket No. 19604 File No. BPH-7843

ORDER

(Adopted January 2, 1974; Released January 3, 1974)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. The Review Board having under consideration the petition filed on December 27, 1973, by Marshall W. Rowland for an extension of time to and including January 4, 1974, within which to file oppositions to the petition to enlarge issues filed by the Broadcast Bureau on October 25, 1973;

2. IT APPEARING, That counsel for the Broadcast Bureau has indicated to petitioner his consent to a grant of the relief requested;

3. IT IS ORDERED, That the petition for extension of time IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–137

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF MINSHALL BROADCASTING CO., INC., LICENSEE OF STATION WCJB–TV, GAINESVILLE, FLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 12, 1974)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. The Commission has under consideration: (1) its Memorandum Opinion and Order, 43 FCC 2d 569 (1973), released November 5, 1973, in which the captioned licensee was found liable for forfeiture in the amount of $1,000, for its repeated violations of the sponsorship identification requirements set forth in Section 317(a)(1) of the Communications Act of 1934, as amended, and Sections 73.654(a) and 73.654(g) of the Commission's Rules; and (2) the licensee's application for remission or mitigation of the forfeiture imposed, filed with the Commission on December 10, 1973.

2. In its application, licensee, by its attorneys, states that the conclusions reached in the Commission's Memorandum Opinion and Order, referenced above, are erroneous as a matter of law; that the licensee, prior to the Commission's recent decision finding it in violation of the sponsorship identification requirements, has not been found to have violated any of the Commission's Rules or the Act; and that further litigation with respect to the instant violations will cause the licensee expenses substantially in excess of the amount of the forfeiture. Licensee requests, therefore, that the forfeiture imposed be remitted.

3. Licensee has presented no additional or new evidence to persuade us that the Commission's Memorandum Opinion and Order was improvidently or improperly issued. The factual and legal bases for the forfeiture's imposition are set forth fully in the Memorandum Opinion and Order, released November 5, 1973, and we find no basis for remission or mitigation of the forfeiture imposed for the licensee's repeated violations of the sponsorship identification requirements set forth in the Communications Act and the Commission's Rules.

4. Accordingly, IT IS ORDERED, That the application for remission or mitigation of the forfeiture of $1,000, filed December 10, 1973, on behalf of Minshall Broadcasting Company, Inc., IS DENIED.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Minshall Broadcasting Company, Inc., licensee of Station WCJB–TV, Gainesville, Florida.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-148

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
NEW YORK TELEPHONE CO., TARIFF F.C.C. No. 37 FILED NOVEMBER 12, 1973 OFFERING LOCAL DISTRIBUTION FACILITIES FOR USE BY OTHER CARRIERS

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 19, 1974)

BY THE COMMISSION:

1. On November 12, 1973, the American Telephone and Telegraph Company (AT&T) and certain Bell System companies, including New York Telephone Company (NYTel), filed tariffs with us which, in general, offer to provide various interconnection facilities to other carriers in purported compliance with previous orders that we had issued. The tariffs were filed generally under protest and were accompanied by claims of the Bell System that we have no jurisdiction over the subject matter of the tariffs. All of the tariffs were published to be effective January 11, 1974 except NYTel's Tariff FCC No. 37 which will become effective on February 24, 1974 unless we take action to suspend or reject it before then.

2. By Memorandum Opinion and Order released January 11, 1974, FCC 74-36, we denied various petitions to suspend these tariffs or reject them at this time including NYTel's Tariff No. 37. We permitted all of the tariffs which were published to be effective on January 11, 1974 to take effect on that date. However, we recognized that substantial questions as to the lawfulness of the tariffs had been raised by the pleadings then before us and that further investigation was warranted. We explained our decision to defer action on the petitions in paragraphs 10 and 11 of our Memorandum Opinion and Order.[1]

3. Although our action of January 11, 1974 was concerned with all of the Bell System tariffs then before us, including NYTel's Tariff No. 37, petitions to reject or suspend, directed specifically to the latter tariff were subsequently filed by Western Union International, Inc. and ITT World Communications, Inc.[2] A principal argument made in these new pleadings is that NYTel's Tariff No. 37 must be rejected because it contains no rates whatsoever except by reference to a tariff filed with the New York State Public Service Commission.

[1] In the Matter of Bell System Tariffs re Entrance, Intercity and Local Distribution Facilities for Other Carriers * * * (FCC 74-36) released January 11, 1974.
[2] Separate petitions to reject or suspend NYTel's tariff was timely filed by both petitioners.

However, on January 31, 1974, the staff, under delegated authority, granted NYTel a waiver of our rules to permit it immediately to file revisions to its Tariff No. 37, effective on full 30 days' notice, so that the specific rates to be applied would be set forth in the tariff on file with us and not by incorporation by reference to a filing with the State commission. Such revised tariff schedules were filed on February 11, 1974. Thus, a principal objection made by Petitioners has been resolved by this tariff revision. Although the more recently filed petitions now before us raise further objections and substantial questions of lawfulness of NYTel's tariff as it relates to interconnection with common carriers engaged in international or foreign communication, we are not persuaded that they provide a basis for us to take action that is different from that which we took in our January 11, 1974 Order.

4. Accordingly, IT IS ORDERED, That the petitions described in paragraph 3 above ARE DENIED to the extent that they request suspension or rejection at this time of NYTel's Tariff F.C.C. No. 37 and ARE DEFERRED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-123

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PEOPLE'S CABLE CORP., TOWN OF PERINGTON, N.Y.	CAC-801 (NY413)
PEOPLE'S CABLE CORP., TOWN OF PENFIELD, N.Y.	CAC-802 (NY 414)
PEOPLE'S CABLE CORP., TOWN OF GATES, N.Y.	CAC-803 (NY415)
PEOPLE'S CABLE CORP., TOWN OF GREECE, N.Y.	CAC-804 (NY416)
PEOPLE'S CABLE CORP., TOWN OF PITTSFORD, N.Y.	CAC-805 (NY417)
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION:

1. On June 30, 1972, People's Cable Corporation filed the above-captioned applications to add two distant independent television signals to its five existing cable television systems serving the towns of Perington, Penfield, Gates, Greece, and Pittsford, all suburbs of Rochester, New York, a major television market (#56).[1] The systems commenced operations in March, 1972, and are presently carrying the following television broadcast signals:

WGR-TV (NBC, Channel 2)	Buffalo, N.Y.
WBEN-TV (CBS, Channel 4)	Do.
WKBW-TV (ABC, Channel 7)	Do.
WXXI (Educational, Channel 21)	Rochester, N.Y.
WROC-TV (NBC, Channel 8)	Do.
WHEC-TV (CBS, Channel 10)	Do.
WOKR (ABC, Channel 13)	Do.

In addition to the above signals, the systems at Perington, Penfield, and Pittsford carry the signal of Station WSYR-TV (NBC, Channel 3), Syracuse, New York. In its applications, People's requests waiver of Section 76.63(a) (as it relates to Section 76.61(b)(2)) of the Commission's Rules in order to carry Stations WOR-TV and WPIX, which are distant independent signals from the New York, New York, Linden-Paterson, New Jersey, television market (#31), the third closest top 25 market. People's also requests waiver of Section 76.251(c) of the Rules so that it need not provide a separate public access or educational access channel for each community. The

[1] The cable systems currently have 12-channel capacities. Ten channels will be available for television signals and two for the required access cablecasting. The populations of the towns are as follows: Gates, 26,442; Greece, 75,136; Penfield, 23,782; Perington, 31,568; Pittsford, 25,058.

applications are opposed by Flower City Television Corporation, licensee of Television Broadcast Station WOKR, Rochester, New York, and Rust Craft Broadcasting of New York, Inc., licensee of Station WROC–TV, Rochester, New York.

OPPOSITIONS TO GRANDFATHERING

2. People's asserts that, pursuant to former Section 74.1105 of the Rules, on January 10, 1970, it mailed notifications of its intent to carry all the Rochester, Buffalo, and Syracuse television signals specified above on its systems at Penfield, Perington, and Pittsford. On January 20, 1970, a copy of this notice was filed with the Commission. WOKR maintains that it never received this notice, nor were WHEC or WROC–TV able to find copies in their files; therefore, WOKR challenges the grandfathered status of these signals under Section 76.65 of the Rules. In reply, People's submitted an affidavit of John Lazor, President of People's Cable Corporation, stating that the notifications were mailed. Further, People's points out that during 1969 and 1970, WOKR had a partial ownership interest in Monroe Cablevision, which was at that time also actively seeking franchises for these communities. People's claims that all parties to these franchise proceedings were aware of each other's plans to import distant signals for use on their respective cable systems; therefore, People's argues that WOKR was aware of People's intention to carry the disputed signals. We must conclude, on the basis of the affidavit, the prompt filing with the Commission of copies of the notification, and the fact that there was probably actual knowledge of the intent to carry distant signals, that there was compliance with Section 74.1105 of the Rules, and carriage of these signals was authorized. *Compare West Valley Cablevision, Inc.*, FCC 69–896, 19 FCC 2d 431; *El Paso Cablevision, Inc.*, FCC 71–65, 27 FCC 2d 935; *Delaware County Cable TV Company*, FCC 68–684, 13 FCC 2d 899.

3. For the towns of Gates and Greece, on January 12, 1970, People's gave notice, pursuant to Section 74.1105 of the Rules, of its intention to carry all Buffalo and Rochester television signals. Pursuant to former Section 74.1109, WOKR filed a petition directed against carriage of distant signals by People's.[2] On March 12, 1970, this petition was withdrawn after the parties reached a private agreement.[3] By letter dated March 31, 1970, the Chief, Cable Television Bureau dismissed the opposition, pursuant to delegated authority. WOKR now argues that the private agreement was breached by People's, and that the opposition should have been "automatically" reinstated. We disagree. It has long been a Commission policy to encourage the settling of disputes privately between the parties, as was the case here. Once the opposition was withdrawn in 1970, only an uncontested Section 74.1105 notification remained, which imparted grandfathering rights. See *Butte Tele-*

[2] The petition, which invoked the mandatory stay provisions of former Section 74.1105(c) of the Rules, was filed in February, 1970, by Channel 13 of Rochester, then licensee of Television Broadcast Station WOKR. The license was transferred in March, 1970 to Flower City Television Corporation.

[3] The agreement between People's and WOKR was reached when People's agreed not to carry the two independents from the Buffalo market and to provide program exclusivity.

rision Company, FCC 73–378, 40 FCC 2d 670. And after these rights vested, they could not be abrogated several years later *nunc pro tunc*. In any event, we note that People's is not proposing carriage of any Buffalo independent stations, and has undertaken to provide program exclusivity to WOKR. Thus, we detect no substantive "breach" of the agreement.

4. WOKR and WROC–TV also request denial of the right to carry grandfathered distant signals on the ground that on March 31, 1972, the People's systems were not operational cable systems as defined by Section 76.5(a) of the Rules. WOKR made an on-site inspection of the cable communities and was unable to ascertain that there were in fact 50 subscribers. Further, WOKR contends that no construction on the systems was started until February, 1972, when People's began an "eleventh-hour crash program" designed to attract a token number of subscribers. WROC–TV argues that the Section 74.1105 notifications mailed 2½ years ago are deficient for grandfathering purposes by reasons of "laches," because People's failure to construct the systems should be considered as abandoning its rights to these signals. People's maintains that it was operating with at least 50 subscribers on each of its systems as of March 31, 1972.[4] The stations' arguments must be denied. Carriage of grandfathered signals is governed by Section 76.65 of the Rules, which provides for carriage of "authorized signals" based on valid Section 74.1105 notifications. The vesting of grandfather rights does not depend on whether a system was operational or on the number of subscribers, nor does a system's failure to construct prior to filing for a certificate of compliance divest these rights. See Paragraph 66 of the *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 351, where the Commission said: "We will not disturb signals where rights have vested, even where the system has not gone into operation." We indicated in paragraphs 2 and 3 above that the notifications given by People's are valid, and we see no reason to deny carriage of these signals. Additionally, WOKR argues that if these signals are grandfathered, carriage should be restricted to the discrete areas where the systems are presently operational. We said in paragraph 107 of the *Cable Television Report and Order*, 36 FCC 2d 143, 185, that a cable television system currently operating with authorized signals "may freely expand in its community." WOKR has given us no reason to depart from this stated policy.

GENERAL OPPOSITIONS AND WAIVER REQUESTS

5. WOKR interprets Section 76.63(a), as it pertains to 76.61(b) of the Rules, as restricting a system located in the Rochester market to the importation of two distant signals. Therefore, according to WOKR, since People's is already carrying four distant network affili-

[4] The number of subscribers follows:

City:	Subscribers
Pittsford	56
Perington	53
Penfield	52
Gates	53
Greece	59

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ates, it is in violation of the Rules. WOKR is incorrect. The sections on which WOKR relies allow a cable system in markets 51 to 100 to carry a minimum complement of three full network stations and two independents. If there are grandfathered distant network signals, they are not counted against a cable system's right to meet its independent signal complement or to add bonus independents under Section 76.61 (c) of the Rules. Thus, People's is perfectly correct in requesting two distant independent signals to fill its minimum carriage complement under Section 76.63(a). *See Sammons Communications, Inc.*, FCC 73–363, 40 FCC 2d 461, and paragraph 90 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 177. WOKR further maintains that since there is already a full complement of network affiliates available off the air at Rochester, there is no need to carry additional duplicating out-of-market network signals. This argument also fails. Carriage under Section 76.65 of the Rules is based on the continuation of previously authorized signals without regard to network affiliation; any protection against duplication of programming to which WOKR is entitled will be afforded through the network exclusivity provisions of Section 76.91 of the Rules.

6. WOKR and WROC–TV also contend that People's proposed carriage of WOR–TV and WPIX is inconsistent with the leapfrogging provisions of Section 76.61(b)(2)(i) of the Rules because New York City is the third closest top 25 market from Rochester, the two closest being Buffalo (#24) and Cleveland (#8). In support, WOKR submits an engineering statement which tabulates the distance from Rochester to Cleveland as 238.9 miles, and Rochester to New York City as 249.5 miles. In reply, People's submits its own calculations which show the towns of Penfield, Perington, and Pittsford (located on the East side of Rochester) as being closer to New York City, and Gates and Greece on the West side of Rochester as being closer to Cleveland. WOKR's calculations are in error since they are measurements from Rochester and not from the cable communities themselves as contemplated by the Rules. We agree with People's that three of the communities are in fact closer to the New York City market than to Cleveland, while the towns of Greece and Gates are ½ and 3½ miles farther, respectively, from the New York City market.[5] The mileage differential is extremely slight (less than 1% of the total distance involved), and in view of this, plus the fact that a minor deviation from Section 76.61(b)(2)(i) here will further the policy of the Rules to encourage in-state programming of more interest to the residents of

[5] The mileage from each of the subject communities to the closest city of the markets in question is as follows, according to a Commission study:

	To Paterson, N.J.	To Cleveland, Ohio
Gates	237.4	234.2
Greece	239.8	239.3
Penfield	229.2	243.5
Perington	227.3	243.9
Pittsford	228.8	240.8

the cable communities, we will grant People's request to carry WOR–TV and WPIX in all five communities. *Madison County Cablevision*, FCC 73–934, 42 FCC 2d 969 (distances of 2.19–8.35 miles; request to carry two in-state independent signals granted); *Further Notice of Proposed Rule Making in Docket 18397*, FCC 69–516, 22 FCC 2d 603, 606 ("In proposing to require that CATV systems refrain from leapfrogging, we did not intend to propose that fractions of miles or de minimis (e.g., less than 5 miles) differences would be determinative.").

7. Finally, WOKR argues that People's has been operating in violation of its franchises.[6] Under the "deliberately structured dualism" recognized by the *Cable Television Report and Order*, *supra*, in the area of federal-state/local relationships, the more appropriate forum for investigation and resolution of these matters is at the local level, either before the municipal authorities or the courts. We see no reason in this case to depart from the general policy that until the People's systems apply for re-certification in 1977, under franchises fully consistent with our Rules, these instruments will not be formally before the Commission for examination. *Compare* Section 76.13(b)(3) of the Rules *with* Section 76.13(c)(2).

8. People's has constructed its systems with two headends: Perington, Pittsford, and Penfield are served from one, and Gates and Greece are served from the other. People's requests waiver of the access requirements of Section 76.251(c) of the Rules to allow sharing of its access channels. Each headend would activate one public access and one educational access channel to be shared by the communities they serve. In paragraph 90 of the *Reconsideration of Cable Television Report and Order*, *supra*, the Commission recognized the special problems that existing "conglomerate systems" might have in meeting access requirements prior to 1977. The availability of four access channels for the total population involved in this proposal brings People's proposal within the scope of prior Commission precedents, and we will therefore grant the requested waiver until March 31, 1977. See *Cable TV Company of York*, FCC 73–459, 40 FCC 2d 927; *Coldwater Cablevision, Inc.*, FCC 73–281, 40 FCC 2d 58; *Gerity Broadcasting Company*, FCC 72–651, 36 FCC 2d 169.

In view of the foregoing, the Commission finds a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That "Opposition to Applications for Certificates of Compliance" filed August 18, 1972, and the "Petition for Special Relief" filed August 9, 1972, both by Flower City Television Corporation ARE DENIED.

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[6] People's franchises were issued on the following dates:

Town	Date granted	Date expires
Gates	Dec. 1, 1969	Nov. 30, 1989
Greece	Oct. 21, 1969	Oct. 20, 1989
Penfield	Nov. 20, 1969	Nov. 19, 1989
Perington	July 10, 1969	July 9, 1989
Pittsford	Sept. 9, 1969	Sept. 8, 1989

IT IS FURTHER ORDERED, That "Opposition to Applications for Certificates of Compliance" filed August 21, 1972, by Rust Craft Broadcasting of New York, Inc., IS DENIED.

IT IS FURTHER ORDERED, That "Petition for Special Relief" filed August 9, 1972, by Flower City Television Corporation IS DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–801–805) filed by People's Cable Corporation ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-156

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PLATTE COUNTY COMMUNICATIONS CO., PLATTE COUNTY, MO. For Certificate of Compliance	CAC-1511 M0074

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 20, 1974)

BY THE COMMISSION:

1. On November 6, 1972, Platte County Communications Company filed an application for a certificate of compliance in which it proposes to operate a new cable television system at Platte County, Missouri, which is located in the Kansas City, Missouri television market (#22).[1] The applicant proposes to carry the following television signals:

KBMA-TV (Independent, Channel 41)	Kansas City, Mo.
KMBC-TV (ABC, Channel 9)	Do.
WDAF-TV (NBC, Channel 4)	Do.
KCMO-TV (CBS, Channel 5)	Do.
KQTV (ABC/NBC, Channel 2)	St. Joseph, Mo.
WIBW-TV (CBS, Channel 13)	Topeka, Kans.
KTWV (Educational, Channel 11)	Do.
KCPT (Educational, Channel 19)	Kansas City, Mo.
KTSB (NBC, Channel 27)	Topeka, Kans.
KDNL-TV (Independent, Channel 30)	St. Louis, Mo.
KPLR-TV (Independent, Channel 11)	Do.

The proposed signal carriage is consistent with the cable television rules, and the application is unopposed.

2. Platte Communications seeks waiver of the franchise-holding requirement of Section 76.31 of the Rules because it contends that Platte County lacks proper authority to issue a franchise. In support of its contention, Platte Communications furnishes a letter it received from Mr. William Fickle, County Prosecutor of Platte County. The letter states in pertinent part:

> * * * [I]t is the opinion of my office that because of the lack of necessary enabling statutes, Platte County is at the present time unable to grant a franchise to Platte County Communications.

Accordingly, Platte Communications requests special relief, pursuant to Section 76.7 of the Commission's Rules, to qualify under Para. 116, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 366

[1] Platte County has a population of 34,000. The system will provide all required access cablecasting services, pursuant to Section 76.251 of the Rules, and will have 22 channels.

(1972), which provides for case-by-case consideration where it is claimed that there is no franchise or other appropriate authorization available for the cable operator to submit in an application for certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal assuring that the substance of our rules, and specifically Section 76.31, is complied with.

3. In support of its request, Platte Communications has made the following representations to the Commission:

(a) that it will accomplish significant construction within one (1) year after receiving Commission certification, and will thereafter extend energized trunk cable to a substantial percentage of its franchise area each year;

(b) that the initial franchise period will be coterminus with the Commission's Certificate of Compliance, which will be fifteen (15) years;

(c) that the initial subscriber rates shall be the same as those established in the Platte City Ordinance, and that no increases will be made except after public notice and public hearing, and approval by a three-man review board appointed by the Mayor of Platte City or other appropriate body; [2]

(d) that the procedures for investigation and resolution of service complaints will be the same as that required by the Platte City Ordinance, and that a local business office or agent for these purposes will be maintained;

(e) that modifications of the Commission's franchise standards will be incorporated into Platte's operating policies immediately upon final adoption by the Commission;

(f) that any franchise fees subsequently required to be paid by Platte Communications will not exceed three (3) percent of Platte's gross annual subscriber revenues from cable operations.

4. We believe Platte Communications has submitted an acceptable alternative proposal which assures compliance with the substance of Section 76.31 of the Rules. Therefore, a certificate of compliance will be issued until March 31, 1977. This grant is made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject community.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–1511), filed by Platte County Communications Company, IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] The Platte City Ordinance sets fees at $20.00 per installation with a $6.00 per month subscriber fee. Platte County Communications Company's application for a certificate of compliance for Platte City was granted on September 7, 1973 (CAC–1512, M0075).

F.C.C. 74–130

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
RADIO SAN JUAN, INC., ASSIGNOR
AND
P. H. BROADCASTING CORP., ASSIGNEE
For assignment of license for Station WRST, Bayamon, P.R.

FEBRUARY 6, 1974.

RADIO SAN JUAN, INC.,
P.O. Box 5627,
San Juan, P.R. 00905
P. H. BROADCASTING CORP.,
% P. Hernandez,
1851 Fernandez Suncos,
Santurce, P.R. 00909

GENTLEMEN: This refers to the application for assignment of license for Station WRSJ, Bayamon, Puerto Rico, from Radio San Juan, Incorporated to P. H. Broadcasting Corporation.

The Commission has examined the assignment application and has found that P. H. Broadcasting Corporation is fully qualified to be a licensee and that a grant of the application would serve the public interest, convenience and necessity. In reaching this conclusion, however, we note that in November, 1971, the Commission designated for evidentiary hearing TeleSanJuan, Incorporated's application for renewal of license for Station WTSJ–TV, San Juan, Puerto Rico, and applications for licenses for Stations WMGZ–TV, Mayaguez, Puerto Rico, and WPSJ–TV, Ponce, Puerto Rico, on issues to determine whether the applicant possessed the requisite qualifications to be or remain a licensee. *TeleSanJuan, Incorporated,* (Docket Nos. 19353–4–5) FCC 71–1178. As shown by the designation Order, the resolution of the issues specified in that proceeding were to be binding on any other licensee commonly owned or controlled with TeleSanJuan, Incorporated, and would be *res judicata* as to any such other licensee. By Memorandum Opinion and Order, FCC 72M–1447, released November 22, 1972, the Administrative Law Judge, pursuant to the applicant's request, dismissed with prejudice TeleSanJuan, Incorporated's applications for renewal and for licenses, thus leaving unresolved the issues specified in Docket Nos. 19353–4–5.

Because these issues remain unresolved, it would ordinarily be necessary to hold an evidentiary hearing on Radio San Juan, Incorporated's qualifications to continue as a licensee of the Commission. However, a different question is presented here. Radio San Juan, Incorporated

now proposes not to continue as a licensee. In this respect, we note that by letter dated December 4, 1973, Radio San Juan, Incorporated represented that it wants to expeditiously withdraw from broadcasting; and, accordingly, states that if the proposed sale of WRSJ is approved, the Commission may feel free to dismiss its pending application for renewal of license for WRSJ–FM. Under these circumstances, we believe that an alternative and better course of action is to grant the assignment application for WRSJ to a qualified local buyer and to effectively remove Radio San Juan, Incorporated from broadcasting. Accordingly, we will grant the assignment application subject to the conditions that: (1) the assignment application for Station WRSJ be consummated within 45 days of the date of grant and that the Commission be notified of the consummation within one day thereafter; and (2) consistent with the representation made by Radio San Juan, Incorporated, Radio San Juan, Incorporated turn in its license for Station WRSJ–FM within twenty (20) days of the date of grant of the assignment application for WRSJ. Failure to comply with these conditions will cause the license renewal application for WRSJ to revert to pending status and result in the automatic cancellation of the grant of the assignment application for WRSJ.

Accordingly, IT IS ORDERED, That the application for renewal of license for Station WRSJ, Bayamon, Puerto Rico, and the application for assignment of license for Station WRSJ, ARE GRANTED subject to the conditions and limitations set forth above.

Chairman Burch concurring in the result. Commissioner Wiley abstaining from voting.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

F.C.C. 74–85

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RADIO STATION WSNT, INC., SANDERSVILLE, GA. FOR RENEWAL OF LICENSE OF STATION WSNT, SANDERSVILLE, GA. Request of Richard Turner et al. for Reimbursement of Expenses	Docket No. 19167 File No. BR–3268

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 12, 1974)

BY THE COMMISSION: CHAIRMAN BURCH CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER WILEY JOINS; COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it for reconsideration the request of Richard Turner and others for an order directing the licensee of Radio Station WSNT, Sandersville, Georgia, to reimburse the legal expenses incurred by Turner and others in their opposition to renewal of the station license. Turner, individually and as agent for the Black Youth Club of Sandersville, and the Southern Christian Leadership Conference (collectively referred to herein as Turner) have asked the Commission to order WSNT to reimburse their "legitimate and prudent" legal expenses (an amount calculated to be $1,931.60) as petitioners to deny WSNT's renewal application. For reasons stated below, we deny Turner's request.

I. BACKGROUND

2. In March 1970 Turner petitioned the Commission to deny renewal of WSNT's license on grounds that the licensee had failed generally to serve the needs and interests of the Black population of its service area. The matter was set for hearing after local negotiations failed to resolve differences between licensee and petitioner. 27 FCC 2d 993 (1971). The parties reached a settlement before the commencement of hearings, however, and the Commission granted renewal of the license on the basis of the settlement at the request of the parties. At the same time, the Commission denied the request for reimbursement that is now before us again. 31 FCC 2d 1080 (1971).

3. Denial of reimbursement was grounded primarily on the Commission's general prohibition of reimbursement in "petition to deny" situations, which had been stated in *KCMC, Inc.*, 25 FCC 2d 603 (1970). There were factual differences between *KCMC* and *WNST*,

the most significant of which was that there was voluntary agreement between licensee and challenger on reimbursement in the *KCMC* case but none in WSNT.[1] But the Commission found that the "factors militating against the reimbursement agreement in *KCMC* are equally relevant in the present situation" and decided the question initially on the basis of the *KCMC* rule. 31 FCC 2d at 1083. The Commission also stated a second ground for denial:

> [E]ven without regard to the precedent established in *KCMC*, a separate and independent ground exists for denial of the intervenors' request. We are convinced that, as a matter of policy, it would be inappropriate for this Commission to compel reimbursement of expenses in the absence of a voluntary agreement of the parties containing such a provision. 31 FCC 2d at 1084.

4. The Commission's refusal to order reimbursement was appealed, and, while that appeal was pending, the *KCMC* decision was reversed in *Office of Communication of the United Church of Christ* v. *FCC*, 150 U.S. App. D.C. 339, 465 F.2d 519 (1972). Because the Commission had relied in part on *KCMC* in deciding the instant case, it joined Turner in asking the court for a remand of the *WSNT* matter to permit reconsideration in the light of the reversal. After studying the court's opinion (hereinafter *Church of Christ III*),[2] and on consideration of the comments of Turner and the National Association of Broadcasters, we again deny the request for an order directing WSNT to reimburse Turner's legal expenses.

II. COMMENTS ON REMAND

5. In comments filed with the Commission, Turner makes the following arguments:

> (a) That 47 U.S.C. 154(i) and 303(r), which authorize the Commission to make orders and perform acts "as may be necessary" to carry out its functions under the Act, provide ample authority for compelling reimbursement of legal expenses in this case.
>
> (b) That the Commission should adopt a policy of compelling reimbursement in appropriate cases in order (1) to facilitate public participation in licensing proceedings and (2) to implement the policy set forth in *Church of Christ III*.
>
> (c) That this is an appropriate case for instituting the policy because (1) the *KCMC* rule prevented Turner from negotiating for a voluntary agreement to reimburse, and (2) the fact that the Commission designated this matter for hearing establishes that the petition was not frivolous.

Turner also calls the Commission's attention to a recent ruling by the Comptroller General, in response to an inquiry by the Federal Trade Commission, that the FTC has authority to reimburse out of its own appropriated funds the incidental expenses of indigent intervenors in certain proceedings. (*Letter to Myles W. Kirkpatrick*, Chairman of Federal Trade Commission, from Elmer B. Staats, Comptroller General, July 24, 1972, B–139703.) Turner argues that the Commission has similar authority, and that it may reach the same result by directing a licensee to pay those expenses.

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[1] WSNT opposed the request for reimbursement and adheres to that position.

[2] This was the third decision under the same name, all dealing with issues relating to citizen group participation in Commission licensing proceedings. See also, *Office of Communication of the United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 359 F. 2d 944 (1966); *Office of Communication of the United Church of Christ* v. *FCC*, 138 U.S. App. D.C. 112, 425 F. 2d 543 (1969).

6. The National Association of Broadcasters makes the following arguments in a statement opposing reimbursement:

(a) That ordering a station to pay the legal expenses of a petitioner to deny is in the nature of a penalty for which there is no statutory authority.
(b) That shifting the attorney fees on the basis of equitable principles is inappropriate where there is no adjudication determining a winner and loser.
(c) That even if the Commission has the authority and is inclined to order reimbursement, it should not do so in this case but should make that change in policy only after rule making.

The NAB argues further that the Comptroller General's ruling on the FTC inquiry is irrelevant to the question of ordering a licensee to pay the expenses of his adversary and should not be considered in this proceeding. Finally, the NAB cites the Court of Appeals' decision in the first *Church of Christ* case in support of the proposition that the expense of participating in administrative proceedings is a useful and legitimate deterrent to "inundation" of the Commission by parties which are not seriously committed to pursuing their petitions. The Court said:

The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation * * *. 123 U.S. App. D.C. at 340, 359 F.2d at 1006.

III. ANALYSIS OF THE ISSUES

7. Three major questions confront the Commission on remand:

(a) What is required by the ruling in *Church of Christ III*?
(b) Does the Commission have the authority to grant Turner's request?
(c) Assuming it has the authority, should the Commission, as a matter of policy, order reimbursement?

A. Church of Christ III

8. In *Church of Christ III*, the Court of Appeals struck down the Commission's *per se* rule against approval of *voluntary* reimbursements in petition to deny situations. The Court ruled that when the settlement of issues between a broadcast licensee and a petitioner to deny is in the public interest, the Commission may not refuse to approve a voluntary agreement between the parties to the settlement calling for reimbursement of legitimate and prudent expenses incurred by the petitioning group.

9. The Court based its decision largely on the "statutory policy" behind Section 311(c) of the Communications Act, 47 U.S.C. § 311(c), which authorizes approval of reimbursement agreements when one of several competing applicants for new broadcast facilities withdraws and thereby permits earlier initiation of service. The statute is limited to applications for new service, but its policy, the Court said, is that "reimbursement which facilitates withdrawal of competing or conflicting petitions is definitely in the public interest when termination of the litigation serves an overriding public interest goal." 150 U.S. App. D.C. at 345. The Court noted that the Commission in the past had approved reimbursement agreements in situations not covered by the

statute when it had found that the public interest would be served thereby.

10. In the case of petitions to deny, the Court said, an overriding public interest goal may be found in the promotion of voluntary settlements at the local level, which might generate an atmosphere of cooperation rather than strife and which "should prove more effective in improving local service than would be the imposition of strict guidelines by the Commission." 150 U.S. App. D.C. at 347. A second public interest goal may be found in facilitating the participation of public groups in the Commission's licensing procedures, the Court said. Since approval of reimbursement agreements in some cases might serve these two goals, the Court concluded, the Commission's *per se* rule against reimbursement in petition to deny situations amounted to a rejection of the policy of Section 311(c) and the Commission's own line of cases implementing that policy. Thus, the Court said, the *per se* rule had to be overturned.

11. Recognizing the possibility of abuses, the Court said they were no more likely in petition to deny situations than in the case of applications for new service. In any event, the Court said the Commission could protect against abuses by making case-by-case determinations of the good faith of parties to the agreements and of the amounts to be reimbursed—just as it does in cases covered by Section 311(c). When the underlying settlement agreement is in the public interest, and when the amount of reimbursement is limited to legitimate and prudent expenses, the Court held, a voluntary reimbursement agreement may not be forbidden.

12. The Court did not reach the question that is before the Commission now: Whether the Commission can or should order an unwilling licensee to reimburse the expenses of a petitioner to deny who has withdrawn his petition pursuant to an agreement that does not provide for reimbursement.[3] Instead, it carefully limited its holding to *voluntary* agreements which encourage settlements of disputes and which facilitate citizen participation in the renewal process.

13. Because the decision struck down a rule that was a major basis for our rejection of Turner's request, we must reconsider our previous ruling. But we do not perceive *Church of Christ III* as requiring any particular result in the different circumstances of this case. First, unlike the *KCMC* situation, there is no precedent of ordering reimbursement which would be rejected by refusal to grant Turner's request.

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[3] In a footnote, the court acknowledged the argument of *amicus curiae* that 47 U.S.C. 154(i) and 303(r) give the Commission "ample authority" to order reimbursement. 150 U.S. App. D.C. at 348, n. 38. But the court did not consider the argument, which it did not have to reach in deciding the case before it. The court did invite comparison of these statutes with a section of the National Labor Relations Act and cited a case decided under that Act, in which the D.C. Circuit had noted the possibility of assessing "the costs of having to litigate a frivolous case." *International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 138 U.S. App. D.C. 249, 259, n. 15, 426 F. 2d 1243, 1253, n. 15 (1970). The N.L.R.B. statute mentioned by the Court, 29 U.S.C. 160(c), authorizes that agency, upon a finding of unfair labor practices, to take "such affirmative action * * * as will effectuate the policies of this subchapter." The cases decided under that statute have recognized broad discretion in fashioning remedies to "make the employee whole" or to restore the "economic status quo" that would have existed but for the unfair practice. See, *e.g.*, *N.L.R.B.*, v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964). We do not believe our powers under a fundamentally different regulatory scheme are analogous.

Second, the primary rationale of *Church of Christ III* is missing here: When the parties already have settled their differences without agreeing on reimbursement, it is not necessary or even useful to order reimbursement to "facilitate termination of litigation." 150 U.S. App. D.C. at 346. Finally, Turner's request raises a jurisdictional question that was not present in *KCMC:* whether the Commission has authority to grant the request.[4]

14. We conclude, therefore, that *Church of Christ III* leaves us free to consider the merits of Turner's very different request and to establish a different policy if that is warranted.

B. Authority to Order Reimbursement

15. We did not reach the question of our authority to grant Turner's request when the matter was here before. Our decision then was grounded upon the general policy stated in *KCMC* and the separate policy against compelling reimbursement by an unwilling licensee. On remand, we address ourselves to this question and determine that we are without authority to require reimbursement in the circumstances of this case.

16. Acknowledging the absence of specific statutory authorization for such an order, Turner finds implicit authority in Sections 4(i) and 303(r) of the Act,[5] which empower the Commission to make rules and issue orders "as may be necessary" in the execution of its functions under the Act. Turner contends that an order requiring WSNT to reimburse his legal expenses may be "necessary" to the proper execution of the Commission's function of facilitating and encouraging public participation in licensing proceedings.

17. Unquestionably, those sections grant us expansive powers for regulating a dynamic and developing industry, *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 219 (1943); and we have relied upon them in dealing with new communications activities and problems.[6] But the shifting of attorney's fees is not a new concept. The fact is that fee shifting was well known to Congress when the Act was adopted, and Congress did not choose to number it specifically among the Commission's regulatory tools. Moreover, any attempt to infer such power from general grants of authority has to be considered in the light of the traditional rule in this nation's courts against awards of attorney's

[4] The decision, of course, also stands for the proposition that the Commission should encourage public participation. But we question Turner's broad statement that "any act" which would facilitate that end is required by our public interest mandate.

[5] 47 U.S.C. 154(i):
The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.
47 U.S.C. 303(r):
Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

[6] See, *e.g., U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 (1972); *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *National Broadcasting Co.* v. *U.S., supra.* But the courts have not always upheld the Commission's reliance on those sections to justify novel regulatory actions. *E.g., American Telephone and Telegraph Co.* v. *FCC and U.S.A.*, — F. 2d at — (No. 73–1806, 2d Cir., October 19, 1973). And the Commission has recognized its own limitations by declining to act on jurisdictional grounds with the approval of the courts. *E.g., Illinois Citizens Committee* v. *FCC*, 467 F. 2d 1397 (7th Cir. 1972).

fees,[7] the strict limitations on the Commission's powers under the Act to require broadcast licensees to pay out money,[8] and the fact that Congress has not hesitated in other circumstances to authorize fee awards explicitly when it has determined such authorization to be warranted.[9]

18. The federal courts have awarded attorney's fees in certain classes of cases not covered by statute,[10] and Turner argues by analogy that the Commission has authority to do the same thing. But the "foundation" for this practice in the courts is "the original authority of the chancellor to do equity in a particular situation," *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166 (1939), and the Commission has no such equitable authority.[11] Instead, the Commission must find its authority in its enabling statutes. *Regents* v. *Carroll*, 338 U.S. 586 (1949); *Illinois Citizens Committee* v. *FCC*, *supra*.

19. Sections 4(i) and 303(r) permit a flexibility that is essential to effective execution of the Commission's regulatory responsibilities. But they may not be interpreted in a way that ignores deliberate and careful limitations on our power to require payment of money.[12] We believe that a specific congressional mandate would be required to justify the order that Turner requests.[13] Since we find no such mandate

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[7] Compare *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), with *Hall* v. *Cole*, 412 U.S. 1 (1973). See generally, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792 (1966); *The Allocation of Attorney's Fees After Mills* v. *Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971). One commentator has suggested that the practice of requiring litigants to pay their own way may be "so deeply engrained in our legal tradition" as to be included in our constitutional concept of due process. Note, *Attorney's Fees : Where Shall the Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216 (1967).

[8] Our sole explicit power under the Act to require broadcasters to pay out money is the forfeiture power, which is subject to a ceiling of $10,000 and a one-year statute of limitations. 47 U.S.C. 503(b). The Act further circumscribes this power by providing that payment may be enforced only by the U.S. district court in the licensee's district after a trial *de novo*, and that the fact of nonpayment may not be used against the licensee in other proceedings unless the district court has ordered payment. The Commission also collects fees from licensees under the command of legislation directing federal agencies to help support themselves by assessing the enterprises they regulate. 31 U.S.C. 483a.

[9] See, *e.g.*, 15 U.S.C. 15 (antitrust) : 15 U.S.C. 1640 (truth in lending) : 29 U.S.C. 216(b) (fair labor standards) : 42 U.S.C. 2000a–3(b) (civil rights). Section 206 of the Communications Act, 47 U.S.C. 206, authorizes the award of attorney's fees to persons injured by a common carrier's violation of the Act. The Act permits the injured party to seek relief either from the Commission or in court, but *only the court* has the power to award fees. *WSAZ, Inc.* v. *AT&T*, 31 FCC 175, 194 (1961). See also 47 U.S.C. 331(b), the recently enacted anti-blackout statute, which authorizes court awards of attorney fees.

[10] For a summary of the law in this area, see *The Allocation of Attorney's Fees After Mills* v. *Electric Auto-Lite Co.*, *supra*, 317–23. See also 6 *Moore's Federal Practice* 1703–17 (1966).

[11] The Second Circuit recently recognized the continuing validity of this proposition in *AT&T* v. *U.S. and FCC*, *supra*, No. 73–1806, in rejecting the Commission's argument that its general inherent powers justified a novel regulatory practice. The Court said :

> We are also mindful that Congress * * * intended that specific statutory authority, rather than general inherent equity power, should provide the agency with its governing standards. (Slip Op. 5494.)

[12] We do not regard as relevant to these questions the Comptroller General's ruling with regard to FTC authority to reimburse indigent intervenors in certain proceedings before that agency, out of agency funds. *Letter to Myles B. Kirkpatrick*, *supra*. Whatever the power of the FTC or this Commission to subsidize indigent intervenors out of its appropriated funds, it does not follow that we may shift that burden to licensees without specific statutory authority. The question of agency subsidies for public participants is not before us in this matter.

[13] The U.S. Court of Appeals for the Second Circuit recently upheld the Federal Power Commission's determination that it lacked authority to award attorney's fees to a public interest intervenor in a licensing proceeding. *Greene County Planning Board* v. *F.P.C.*, 455 F.2d 412, *cert. denied*, 409 U.S. 849 (1972). One of the sections under which the award was requested, Section 309 of the Federal Power Act, 16 U.S.C. § 825(h), contains language similar to that of Sections 4(i) and 303(r) of the Communications Act. The court said, in part : "[W]e perceive no basis in the terms of the provision [Section 309] to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer Congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them when to do so was in the public interest." 455 F.2d at 426.

in the Communications Act, we conclude that we are without authority to order reimbursement.

C. Policy Considerations

20. Even if we had authority, we would not order WSNT to pay Turner's expenses, as a matter of policy. First, we remain convinced of the soundness of our determination when this case was here before that:

> * * * it would be inappropriate for this Commission to compel reimbursement of expenses in the absence of a voluntary agreement of the parties containing such a provision. 31 FCC 2d at 1084.

And secondly, there has been no finding of wrongdoing on the part of WSNT, nor any determination that its past operation was contrary to the public interest, so as to justify the award of attorney's fees under any rationale that has come to our attention.[14]

21. Unlike the situation in *KCMC*, *supra*, where the request was for approval of a voluntary agreement to reimburse, there is no element in this case of promoting voluntary settlements and generating an atmosphere of cooperation between licensee and petitioner to deny. Instead, the parties here already have settled their substantive differences, and they are adversaries on the reimbursement question. An order of reimbursement, therefore, can have no effect on the instant settlement; a general policy of ordering reimbursement, on the contrary, could have the effect of stifling voluntary settlements in the future, because the element of fees would no longer be available as a basis for compromise. Thus, the principal public interest goal relied upon by the Court in *Church of Christ III*—the promotion of voluntary settlements—does not support reimbursement in the different circumstances of this case.

22. We agree with Turner that ordering reimbursement would encourage petitions to deny by citizen groups. But we do not accept his argument that the Commission must or should perform "any act" that would encourage such participation. Other considerations are entitled to weight as well, such as the traditional rule that litigants bear their own expenses, the interest in ensuring that participants in licensing proceedings have a sufficient interest to justify participation, the prospect of inundation of the regulatory process, and fairness to broadcast licensees as well as to citizen groups. We believe those considerations are of at least equal importance with any encouragement of participation that might result from an order of reimbursement.

23. We are reinforced in this policy conclusion by the fact that none of the other regulatory agencies awards attorney's fees in analogous situations. Moreover, a recent recommendation by the Administrative Conference of the United States, dealing with public participation in

[14] A further consideration, assuming that we had authority and were convinced of the soundness of such a policy, is whether we could or should adopt it by *ad hoc* adjudication rather than after notice and rule making. There is a strong preference for rule making where an agency is seeking to impose new liabilities or penalties or where it is altering established policy. *E.g., Bell Aerospace Co., Division of Textron* v. *N.L.R.B.*, 475 F.2d 485 (2d Cir. 1973). *Cf., National Petroleum Refiners Ass'n.* v. *FTC*, 482 F.2d 672, 678–84 (D.C. Cir. 1973). See generally, Wright, *Beyond Discretionary Justice* (book review), 81 Yale L. J. 575 (1972), and K. C. Davis, *Discretionary Justice*, 27–51 (1969).

agency proceedings, failed to include provisions for shifting attorney's fees, even though it recommended substantial steps to encourage and facilitate such participation.[15] These factors are not conclusive of our own policy judgment, of course, which must take into account the public interest mandate of the Communications Act. But they are instructive as indications of how our sister agencies have acted in this area of common concern.

24. In this particular case, there is no basis in fairness for an order awarding attorney's fees to Turner. The Commission is asked here to order payment of fees by one who has not been adjudged a wrongdoer for the benefit of one who has not prevailed in any adjudicatory proceeding. Designation for hearing clearly is not tantamount to a ruling on the merits of Turner's complaint. It does not denigrate Turner's role in this proceeding to point out that the Commission found only that the settlement agreement was in the public interest. Moreover, it is not ascertainable from that agreement how much each party contributed to its substance. Without findings of wrongdoing or of frivolous litigation, there is no justification for an award of attorney's fees, even if we had the authority and the inclination to make such an award.

IV. CONCLUSIONS

25. Our analysis leads to the following conclusions:

(a) *Church of Christ III* undercuts a part of our rationale in denying Turner's request when the matter was here before, but it does not require any particular result.

(b) The Communications Act does not authorize us to order an unwilling licensee to pay the expenses of a petitioner to deny.

(c) Even if we had the authority to order reimbursement, we would not do so because we do not regard it as sound or desirable policy, especially in the absence of a finding of wrongdoing on WSNT's part.

Accordingly, IT IS ORDERED that the request for reimbursement filed by Turner and remanded to this Commission for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CONCURRING STATEMENT BY CHAIRMAN DEAN BURCH

I concur in this action on the same ground as my concurrence to our original decision to deny the request for reimbursement (31 FCC 2d 1080, 1084)—that, because this is a case where one of the parties to a consent agreement does not also agree to reimburse the expenses of the other, it can be clearly distinguished from *KCMC, Inc.*

The KCMC case did not, in my judgment, raise a jurisdictional question. We had authority to grant a request for approval of *voluntary* reimbursement and, as I indicated in my dissent (25 FCC 2d 603, 605), we had under Section 311(c) allowed reimbursement of expenses in

[15] Recommendation 28, Public Participation in Administrative Hearings, Administrative Conference of the United States, adopted December 7, 1971. For examples of alternative means of encouraging such participation, see Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L. J. 359 (1972); Lazarus and Onek, *The Regulators and the People*, 57 Va. L. Rev. 1069 (1971).

various situations, some of them comparative hearing cases. But there is no precedent for our *ordering* reimbursement, and I am not convinced we have the authority to do so. Least of all is our authority clear when there has been no finding of wrongdoing on the part of the licensee.

The petitioners from Sandersville raised material and substantial questions about the operation of WSNT in a petition to deny and, as a result, we designated the station's 1969 renewal application for hearing. Shortly thereafter the parties entered into an agreement whereby the petitioners withdrew their petition and the licensee amended its renewal application. On that basis, and particularly because of the statement of future station policy, we were persuaded that the grant of WSNT's renewal application would be in the public interest.

Paradoxically, while it is beyond our authority to require a licensee to reimburse the petitioners for the expenses incurred in their efforts to prosecute their petition to deny, there is no question but that these efforts contributed materially to our public interest finding. Thus, it is our very clear and continuing responsibility, through periodic review of the station's operation, to assure ourselves that the issues raised in the petition to deny have been rendered moot and that the statement of station policy that led us to rescind our designation order remains in force.

(Commissioner Wiley joins in this statement.)

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

The finality with which the Commission, today, closed the doors on involuntary reimbursement leaves me deeply distressed. Does the action taken by the majority herein, ring the death bell for public interest groups wishing to participate in our licensing processes? Only time and the courts will tell. The action does, however, sound ominous for those groups.

We have gone on record behind the proposition that we depend on such groups to do what we cannot do ourselves, *viz.*, continuous monitoring of the activities of our licensees. We talk about the role of millions of quasi-attorneys general through complaints and legal actions. One of those attorneys general, Petitioner in the instant proceeding, expended time and money in its preparation of the pleadings which led to WSNT's licensee renewal application being designated for hearing. Petitioner and WSNT, in an effort to expedite the proceeding, reached an out-of-court settlement of their substantive differences—a practice smiled upon by this Commission and every known tribunal. By virtue of the settlement, WSNT received its renewal without enduring a hearing and as a result received a substantial benefit (not the least of which is monetary). Thereafter, Petitioner, in good faith, withdrew its Petition to Deny, leaving open only the matter of reimbursement of legal fees. Not being able to reach an agreement on that issue, Petitioner, which identified derelictions sufficient to require hearing (which deficiencies we would not have otherwise found), thereupon requested our aid and assistance; we today denied that assistance.

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Notwithstanding the majority's lengthy recitation of cases, the law on the subject of our authority to order involuntary reimbursement is far from clear. The most relevant case on the subject, *Office of Communications of the United Church of Christ* v. *FCC*, 150 U.S. App. D.C. 339, 465 F. 2d 519 (1972) (hereinafter "*Church III*") rejected the Commission's categorical ban on voluntary reimbursements between broadcasters and community groups. In so doing, and although the issue in that case was voluntary reimbursement, the court predicated its reversal on two separate and distinct grounds. The first, set forth as *par.* IV in the *Church III* decision, discussed "Allowing Reimbursement to Facilitate Settlement of Litigation", *id.* at 344, 465 F. 2d at 524, and analogized voluntary reimbursements to "buy-out" agreements between competing applicants which we have traditionally allowed.[1] And, there was a strong undercurrent suggesting that, absent abuse, the Commission had no valid business intruding into the arms-length agreements between private parties. Thus, *par.* IV, as I read it, proffered the arguments favoring voluntary reimbursements.

But a second, independent ground—and one that applies as persuasively for the concept of involuntary reimbursement—was set forth as *par.* V of *Church III* and is styled "Award of Reimbursement to Facilitate Public Participation."[2] Start with the proposition that the term "award", in and of itself, denotes that the arrangement is not voluntary and that some supernumerary authority must decide whether or not to "award" reimbursement; if the parties have voluntarily agreed in previous negotiations there is little need for an "award". Moreover, considering court and Commission precedent which aspires to encourage community group participation,[3] it is evident that a lack of legal and financial resources is the largest single obstacle to such participation. Recognizing that this practical hurdle discourages community groups—mostly, ordinary citizens whose interest in communications is extra curricular—the court in *Citizens III* dropped an interesting, though enigmatic, footnote which appears to leave the involuntary reimbursement door ajar. Noting the salutory effect of citizen reimbursement, the court went on to say as follows:

> [36] *Amicus Curiae*, Friends of the Earth, contends §§ 154(i) and 303(r) of the Communications Act give the Commission *ample authority to order a licensee to reimburse citizen groups* which have filed petitions to deny. Compare these sections with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), and the broad authority it vests in the National Labor Relations Board. *International Union of Electrical Workers* v. *N.L.R.B.*, 138 U.S. App. D.C. 249, 426 F. 2d 1243 (1970).[4]

Church III, *supra*, 150 U.S. App. D.C. at 348, 465 F. 2d at 528. (Emphasis supplied). Hence, the court seemed to intimate by its failure to then and there disapprove the assertion that our general

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[1] *See* 47 U.S.C. § 311(c).

[2] *Church III*, *supra*, at 347, 465 F. 2d at 527.

[3] Respectively, the courts and the FCC have asserted their favor of public participation. *See generally*, *Office of Communications of United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 238, 359 F. 2d 994 (1966); *Office of Communications of United Church of Christ* v. *FCC*, 138 U.S. App. D.C. 112, 425 F. 2d 543 (1969). Likewise, the Commission has echoed this sentiment. *See, e.g.*, "The Public and Broadcasting; Procedural Manual," 37 Fed. Reg. 20510 (1972).

[4] *See* majority *Order*, note 3.

rule making powers (enunciated in 47 U.S.C. §§ 151(i) and 303(r)) might be broad enough to permit us "to order" reimbursement. The same tentative reading emerges from *Greene County Planning Board* v. *FPC*, 455 F. 2d 412, *cert. denied*, 409 U.S. 849 (1972), cited in the majority *Order*, note 13. While apparently deposing in the negative on the Federal Power Commission's authority to impose reimbursement of counsel fees to a public interest group in the absence of clear statutory provisions therefor, the Second Circuit Court of Appeals then hedged on FPC's ultimate authority to do so inasmuch as the case involved was in an incomplete status. The *Greene County* court reserved judgment and closed by saying:

> Without a showing of compelling need, it would be premature for us to inject the federal Courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules. 455 F. 2d at 427

Earlier in the same decision, the court also seemed to refuse to preclude the FPC's authority through administrative policy asserting:

> But in an effort to buttress its argument that the petitions for review are in this regard untimely, the Commission now argues that it has foreclosed only the present award of fees and has left open the question of whether ultimately to award them when the proceedings have come to an end. Whether or not the Commission will entertain renewed motions at the close of its proceedings, we find that the petitions are timely and that this Court has jurisdiction to review the Commission's Order. *Id.*, at 412.

Consequently, I do not believe that either *Church III* or *Greene County* disposes of the issue with the finality inferred by majority and I submit that the *Church III* language hereinabove referenced leaves the question wide-open insofar as the District of Columbia Circuit. In that posture, it would seem that to facilitate the public participation and interest called for, we should at least take the initiative, assert our authority, and let the courts settle the issue if that is necessary. We should not, in the case of public interest groups, continually manifest our presumptions in the negative where the law is unsettled.

In other realms where our authority is not legislatively verbalized in the Communications Act[5] (*e.g.*, CATV, telephone pole attachments, license "cancellations", radio equipment performance standards, prime time access, fairness doctrine, multiple ownership, children's television and other places where our express powers are murky), this Commission has had little difficulty inflating our general rule making authority to the extreme perimeters;[6] and the courts have generally sustained us according great weight to the agency's interpretations of its own

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[5] 47 U.S.C. § 151 *et seq*

[6] *See, e.g., National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943) where the Supreme Court noted that our general powers were to be construed as "not niggardly, but expansive." Moreover, the Supreme Court has opined that it may not "in the absence of compelling evidence that such was Congress' intention * * * prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *U.S.* v. *Southwestern Cable*, 392 U.S. 157, 177 (1968) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 780). In the case of reimbursement, we have no "compelling evidence" that Congress would disapprove of the administrative handling of reimbursements or that it cares, one way or another. Finally, on the question of the leeway of administrative authority in the absence of precise statutory disposition, the Supreme Court again upheld our right to take whatever action is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of * * * broadcasting". *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649, 651 (1972) citing *Southwestern Cable*), and went on to declaim that "to define the Commission's power in terms of protection, as

organic legislation.[7] Here, where community groups perform an "eyes and ears" service which—given the limited resources we constantly cite—we could not duplicate for tens of millions of dollars on an overall basis (let alone the $1,931.60 Petitioner seeks herein), we again exhibit that "curious neutrality-in-favor-of-the-licensee" for which we have been judicially reproached.[8] Why are we so slow in affording rights to public intervenors;[9] why not assert our authority in favor of these community groups and let the licensees, if dissatisfied, appeal our lack of authority? I am not saying, as have some parties inside and out of the Commission, that we *always* ignore the desires of public interest groups. I could cite a number of examples (*e.g.*, extending the period in which to oppose license applications, establishment of internal and external EEO offices, ordering a public right to inspect licensee files and TV logs, etc.) where the Commission has been responsive to community group requests. It's just that we, too frequently, reflect the appearance of siding with broadcast licensees over their critics and this decision, abjuring from the involuntary reimbursement approach, is illustrative of that image.

Finally, assuming *arguendo*, that the courts ultimately decide that we do not have the statutory authority to compel involuntary reimbursement absent Congressional legislation, we should as a matter of policy follow the lead of our sister agencies, the ICC and the FTC, and establish an internal office which would lend legal expertise to qualified public interest groups.[10]

In the instant case, the Commission does not even suggest this course as an immediate alternative and state that, short of ordering involuntary reimbursement, it will itself assist citizens in addressing an agency sworn to work for them. One way or the other (*i.e.*, permitting involuntary reimbursements or providing our own counsel), we must assist an interested public in securing adequate representation.

For these reasons, *inter se*, I dissent.

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opposed to the advancement, of broadcasting objectives would artificially constrict the Commission in the achievement of its statutory purposes." *Id.* at 665. There is no question but that the Commission's concern and, indeed, duty with respect to public intervenors is "reasonably ancillary" to its effective operations (*see Church of Christ* cases, *supra*, n. 3) and that adequate representation of such groups by competent counsel, while not "protecting" broadcasters, would unquestionably "advance" broadcasting in the public interest.

[7] *Cf. Mt. Mansfield Television, Inc.* v. *FCC*, 442 F. 2d 470 (2nd Cir. 1970); *See also, Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F. 2d 282, 284 (D.C. Cir. 1966) stating:

> In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.

[8] *Office of Communications of United Church of Christ* v. *FCC*, *supra*, note 3, 138 U.S. App. D.C. at 116, 425 F. 2d at 547.

[9] *E.g.*, over Commission resistance, the courts have instructed the Commission that it must allow intervention of citizens groups (*Church of Christ* cases, *supra*, note 3); that it must afford licensee challengers a true and complete comparative hearing (*Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F. 2d 124 (1971); that it must consider program format changes where members of the community object (*Citizens Committee* v. *FCC*, 141 U.S. App. D.C. 109, 436 F. 2d 263 (1970)); and finally, that it cannot unequivocally prohibit voluntary reimbursements (*Church III*, *supra*).

[10] It is my understanding that both the Federal Trade Commission and the Interstate Commerce Commission have made some arrangements to provide counsel to public interest groups participating in agency proceedings. While I recognize that the Administrative Conference has been studying this matter for a number of years with an eye toward a government-wide policy, there is no bar to our taking the same action as the ICC and FPC. Perhaps a little documentation of actual experience could help the Administrative Conference in its deliberations; it might even hasten those determinations.

F.C.C. 74R-53

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RADIO TELEPHONE CO. OF GAINESVILLE, GAINESVILLE, FLA.	Docket No. 19678 File No. 426-M-L-62
W. DONALD MOLITOR AND DONALD N. MOLITOR, D.B.A. CANAVERAL COMMUNICATIONS, COCOA, FLA.	Docket No. 19679 File No. 294-M-L-62
MARINE TELEPHONE COMPANY, INC., MIAMI, FLA.	Docket No. 19680 File No. 232-M-L-52
For a Public Coast Class III (VHF) Radio Station To Serve the Daytona Beach-New Smyrna Beach, Fla. Locality.	

ORDER

(Adopted February 13, 1974; Released February 19, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. The Review Board having under consideration the Initial Decision herein, the exceptions and briefs, and the request for oral argument, filed with respect thereto;

2. IT IS ORDERED, That oral argument before a panel of the Review Board IS SCHEDULED for March 14, 1974, commencing at 10 A.M., in Room 650, 1919 M Street, N.W., Washington, D.C.; that the parties who within five days after release of this Order file written notice of intention to participate in oral argument (Section 1.277(c) of the Rules) shall each be allowed 20 minutes for argument; that counsel for Marine Telephone Company, Inc. may reserve part of his time for rebuttal; and that the order appearance shall be:

Marine Telephone Company, Inc.
Radio Telephone Company Of Gainesville
Safety and Special Radio Services Bureau

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–139

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RESORT BROADCASTING CO., INC., LEISURE CITY, FLA.	Docket No. 18956 File No. BPH–6545
FINE ARTS BROADCASTING CO., GOULDS, FLA.	Docket No. 18958
For Construction Permits	File No. BPH–6617

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 11, 1974)

BY THE COMMISSION:

1. We have before us for consideration: (a) an application for review of a Review Board Decision, 41 FCC 2d 640 (1973) filed August 3, 1973, by Resort Broadcasting Co., Inc.; (b) comments on the application for review filed August 22, 1973, by the Broadcast Bureau; (c) an opposition to the application for review filed August 31, 1973, by Fine Arts Broadcasting Co.; and (d) a reply to oppositions filed September 20, 1973, by Resort. Also before us is a Petition for Leave to Amend, filed by Resort Broadcasting Co., on August 20, 1973, and the Comments of the Broadcast Bureau thereon. The amendment is tendered in compliance with Section 1.65 of the Rules, and reflects the fact Lester H. Allen has disposed of certain CATV interests, which were considered of decisional significance by the Board in its decision.

2. We have carefully considered the record in this proceeding and we are in basic agreement with the findings and conclusions reached by the Review Board in its Decision.

3. Accordingly, IT IS ORDERED, That the application for review filed August 3, 1973, by Resort Broadcasting Co., Inc., IS DENIED.

4. IT IS FURTHER ORDERED, That, the Petition for Leave to Amend filed August 20, 1973 by Resort Broadcasting Co., Inc., IS GRANTED for the limited purpose of complying with Section 1.65 of the Rules, and conditioned on the applicant's receiving no comparative advantage thereunder, and

5. IT IS FURTHER ORDERED, That the application for a construction permit filed by Resort Broadcasting Co., Inc. (BPH–6545), IS DENIED, and the application for a construction permit filed by Fine Arts Broadcasting Co. (BPH–6617), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–154

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SANTA FE CABLEVISION CO., SANTA FE, N. MEX. For Certificate of Compliance	CAC–957 NM017

MEMORANDUM OPINION AND ORDER

(Adopted February 13, 1974; Released February 20, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On November 9, 1973, Spanish International Communications Corporation, licensee of Television Broadcast Station KMEX–TV, Los Angeles, California, filed a petition for reconsideration directed against the Commission's action in *Santa Fe Cablevision Co.*, FCC 73–1022, 43 FCC 2d 276 (1973). Santa Fe Cablevision Company, operator of a cable television system at Santa Fe, New Mexico, has opposed this petition and Spanish International has replied.

2. In its petition, Spanish International objects to Santa Fe's carriage of Station XEPM–TV (foreign language), Juarez, Mexico, and its arguments rest on the premise that "unrestricted importation of Mexican signals could well destroy domestic Spanish-language broadcasting in the United States * * *." Essentially, Spanish International argues that the Commission should prohibit the importation by U.S. cable television systems of Mexican stations where the economic viability of domestic Spanish-language television stations may be threatened or where U.S. Spanish-language programming is available to the cable operator, either off-the-air or via microwave.

3. Similar arguments by Spanish International were considered and rejected in conjunction with the cable television rulemaking proceeding in Docket 18397, *et al*, and on several subsequent occasions.[1] In this particular situation, petitioner has not submitted evidence in the original proceeding or on reconsideration which persuades us that special circumstances exist that warrant prohibiting Santa Fe Cablevision's carriage of Station XEPM–TV. And Spanish International's arguments on behalf of other unidentified Spanish-language television stations lack specificity for determination in this proceeding.[2]

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[1] *See Reconsideration of Cable Television Report and Order*, para. 23, FCC 72–530, 36 FCC 2d 326, 334–35 (1972); *Cable Television Report and Order*, para. 96, FCC 72–108, 36 FCC 2d 143, 180–81 (1972); *Sierra Vista CATV Co.*, FCC 73–1170, 43 FCC 2d 958 (1973); *General Communications & Entertainment Co., Inc.*, FCC 73–632, 41 FCC 2d 501 (1973); *Mickelson Media, Inc.*, FCC 73–119, 39 FCC 2d 602 (1973).

[2] *Sierra Vista CATV Co., Inc., supra*, n. 3 (1973).

In view of the foregoing, the Commission finds that reconsideration of its actions in *Santa Fe Cablevision Co.*, FCC 73–1022, 43 FCC 2d 276 (1973), would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed November 9, 1973, by Spanish International Communications Corporation, licensee of Television Broadcast Station KMEX–TV, Los Angeles, California, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 73.1201(c) OF THE COMMISSION'S RULES PERTAINING TO STATION IDENTIFICATION REQUIREMENTS

ORDER

(Adopted February 13, 1974; Released February 19, 1974)

BY THE COMMISSION:

1. Section 73.1201(c) of the Commission's rules regarding station identification announcements requires that station identification announcements be given only over the channel of the station identified thereby.

2. The requirement has served two purposes: to avoid any confusion among the public, and to assist the Commission's enforcement activities. However, it has also had the effect of requiring satellite stations in all services to make an awkward interruption of programming to make the announcements, and in some cases has required the presence of an operator for the sole purpose of inserting station identification announcements. It appears that other means are available to serve the same purposes as the present rule, and that it would be in the public interest for the Commission to provide for a less complicated and less burdensome method of identification which would reduce the likelihood of misidentification of satellite stations through operator or mechanical error and still clearly identify the station viewed or listened to. Accordingly, section 73.1201(c) of the Commission's rules is amended to read as follows:

§ 73.1201 Station Identification

* * * * * * *

(c) (1) *General.* Except as otherwise provided in this paragraph, in making the identification announcement the call letters shall be given only on the channel identified thereby.

(2) *Simultaneous AM–FM broadcasts.* If the same licensee operates an FM broadcast station and a standard broadcast station and simultaneously broadcasts the same programs over the facilities of both such stations, station identification announcements may be made jointly for both stations for periods of such simultaneous operation. If the call letters of the FM station do not clearly reveal that it is an FM station, the joint announcement shall so identify it.

(3) *Satellite operation.* When programming of a broadcast station is rebroadcast simultaneously over the facilities of a satellite station, the originating station may make identification announcements for the satellite station for periods of such simultaneous operation.

(i) In the case of a television broadcast station, such announcements, in addition to the information required by paragraph (b) (1) of this section, shall include the number of the channel on which each station is operating.

(ii) In the case of aural broadcast stations, such announcements, in addition to the information required by paragraph (b) (1) of this section, shall include the frequency on which each station is operating.

3. This amendment to the rules is adopted pursuant to authority contained in sections 4 (i) and (j) and 303(r) of the Communications Act of 1934, as amended. Since this amendment constitutes a relaxation of present requirements, imposes no new requirements, and will not adversely affect the rights of any licensee, prior notice of proposed rulemaking and the effective date requirements of the Administrative Procedure Act (5 U.S.C. 553 (b) and (d)) are unnecessary, pursuant to 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(1).

4. Accordingly, IT IS ORDERED That, effective February 27, 1974, section 73.1201(c) of the Commission's Rules and Regulations IS AMENDED to read as set forth above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–120

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TELE-MEDIA COMPANY OF LAKE ERIE, NORTH KINGSVILLE, OHIO For Certificate of Compliance	CAC–1656 OH282

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 12, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. Tele-Media Company of Lake Erie, proposed operator of a cable system at the Village of North Kingsville, Ohio, located within the Erie, Pennsylvania, smaller television market, has filed an application for a certificate of compliance, pursuant to Section 76.13(b) of the Commission's Rules, requesting certification for the following television broadcast signals:[1]

WICU–TV (NBC, Channel 12)	Erie, Pa.
WJET–TV (ABC, Channel 24)	Do.
WSEE (CBS, Channel 35)	Do.
WQLN (Educational, Channel 54)	Do.
WKYC–TV (NBC, Channel 3)	Cleveland, Ohio.
WEWS (ABC, Channel 5)	Do.
WJW–TV (CBS, Channel 8)	Do.
WUAB (Independent, Channel 43)	Lorain, Ohio.
WKBF–TV (Independent, Channel 61)	Cleveland, Ohio.
WFMJ–TV (NBC, Channel 21)	Youngstown, Ohio.
WKBN–TV (CBS, Channel 27)	Do.
CFPL–TV (CBC, Channel 10)	London, Ontario, Canada.
CHCH–TV (Independent, Channel 11)	Hamilton, Ontario, Canada.
CKCO–TV (CTV, Channel 13)	Kitchener, Ontario, Canada.

Tele-Media asserts the right to carry the above-listed signals pursuant to Section 76.65 of the Commission's Rules.[2] The application is unopposed.

2. If the signals are, in fact, "grandfathered," this proposed carriage is consistent with the Commission's Rules.[3] Tele-Media's claim to grandfathered status is based on letters of notification of proposed cable service dated and filed with the Commission on March 1, 1972, pursuant to former Section 74.1105. However, in Paragraph 66 of the

[1] North Kingsville has a population of 2,458. The proposed system will have 12-channel capacity. Of these channels, 11 are to be used for television broadcast signal carriage.

[2] Section 76.65 of the Rules provides, in pertinent part: "The provisions of §§ 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry * * * prior to March 31, 1972 * * *." Footnote 58 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 185, states: "Included among authorized signals are * * * those authorized by operation of the provisions of former Section 74.1105 of the Rules * * *."

[3] If the signals are not grandfathered, Tele-Media can carry only the first seven signals listed in Paragraph 1, plus one independent signal, pursuant to Section 76.59 of the Rules.

Reconsideration of Cable Television Report and Order, FCC 72–530, 36 FCC 2d 326, we stated: "* * * [A]ny notification filed after the end of February, 1972, conferred no rights on cable systems because the effective date of the rules preceded the time for filing objections to the notifications." [4]

3. Tele-Media argues that only 350–400 subscribers are expected in the village. The system will be served from the headend at Conneaut, where Tele-Media has been operating a grandfathered system for several years, which carries those signals requested in the present application. North Kingsville is at the edge of the 35-mile zone of the Erie, Pennsylvania, market. It has reached agreements with all three Erie commercial television stations not to oppose a grant of the application. Tele-Media further asserts that the Commission has been flexible in the area of grandfathering in the past.[5] Since grandfathering involves balancing cable and television interests, it argues, there should be no problem in recognizing the grandfathered status of these signals when the television broadcasters do not object to such classification. It adds that it would present technical problems to provide different signals in North Kingsville and Conneaut and that the system would not be viable with such a limited choice of signals. Finally Tele-Media asserts that if the Section 74.1105 notice period includes the day of filing, it would have run before March 31, 1972, when the new cable rules went into effect.

4. We reject Tele-Media's contention that the signals are grandfathered. Pursuant to Section 1.4(a) of the Rules, in determining the starting and concluding dates for the 30-day notice period in question, the first day to be counted would be March 2, 1972, and the thirtieth day would be March 31, 1972.[6] Since, in the words of Section 76.65, the notice period did not expire "prior to" March 31, 1972, Tele-Media's signals were not "authorized" by operation of former Section 74.1105, and therefore cannot be considered as grandfathered. Although the Section 74.1105 notification was filed one day too late to confer rights on the cable system, we believe that it is appropriate to grant special relief in this situation. We note especially the smallness of the community and the facts that it is barely inside any television market, that the three "local" commercial television stations have chosen not to object to carriage of the requested signals, and that it would be technically difficult to provide different signals in North Kingsville and

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[4] Under former Section 74.1105(c), the time for filing objections was "within thirty (30) days after notice."

[5] It cites *Greater Lawrence Community Antenna, Inc.*, FCC 73–205, 39 FCC 2d 935, and *Butte Television Co., Inc.*, FCC 73–378, 40 FCC 2d 387, as examples of Commission flexibility. In the first case, Greater Lawrence tendered a technically deficient Section 74.1105 notification to the Commission on February 22, 1972; the notification was returned to it and it was given 30 days in which to correct the deficiencies. The notification, in proper form, received March 6, 1972, was accepted *nunc pro tunc* February 22, 1972. In the latter case, a Section 74.1105 notification was filed November 6, 1970. On December 4, 1970, Butte filed a petition for special relief, which was opposed. When the objection was withdrawn, only the uncontested notification remained.

[6] Section 1.4(a) of the Commission's Rules provides: "(a) It is frequently necessary under Commission procedures to compute the terminal date of a period of time where the period begins with the occurrence of an act, event, or default and terminates a specified number of days thereafter. Unless otherwise provided by statute, the first day to be counted in computing the terminal date is the day after the day on which the act, event, or default occurs. The last day of such period of time is included in the computation and any action required must be taken on or before that day."

Conneaut, since both communities will be served by a common headend located at Conneaut and all 14 signals are received there.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" (CAC–1656) filed by Tele-Media Company of Lake Erie IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–144

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTIONS 89.117(b) AND 93.109 (b) TO CLARIFY LANGUAGE AND IN PART 93 TO SPECIFY A NEW TYPE-ACCEPTANCE DATE FOR RADIO-LOCATION EQUIPMENT.

ORDER

(Adopted February 13, 1974; Released February 20, 1974)

BY THE COMMISSION:

1. By Commission Order, all new radiolocation equipment authorized subsequent to January 1, 1974, to operate in the Public Safety and Land Transportation Radio Services (Parts 89 and 93, respectively) must be type-accepted by the Commission for operation.

2. The Association of American Railroads (AAR), however, has requested a six month extension of the above date for users authorized in Part 93, the Land Transportation Radio Services. In support of its request, the AAR states that manufacturers of radiolocation equipment used by the railroads misunderstood the type-acceptance requirement and, consequently, have made no progress toward obtaining type-acceptance for their equipment. The requested six month extension, AAR states, will provide the manufacturers with the additional time necessary to apply for, and obtain, the required type-acceptance.

3. We have carefully reviewed this request and, in view of the misunderstanding, feel that the public interest will be served by granting it, because the railroads will be provided with an adequate opportunity to comply with our rules without disruption of railroad operations.

4. In addition, on our own motion, we will amend Section 89.117(b) and 93.109(b) to exclude previously authorized radiolocation stations governed by Parts 89 and 93 from the equipment type-acceptance requirement. This will mean that radiolocation stations authorized under Part 89 prior to January 1, 1974, and stations authorized under Part 93 prior to July 1, 1974, may be continued to be authorized indefinitely even though non-type-accepted equipment is used. This action will ease the equipment conversion problems and would be in the public interest. There also appears to be some confusion as to the requirements with regard to marketing of equipment for use under these parts. Therefore, we have amended the above Sections to reflect the current equipment marketing requirements as specified in Subpart I of Part 2 of our Rules.

5. The amendments adopted here relax requirements and acceptance on the part of those affected is expected. Therefore, we conclude that

compliance with the prior notice and effective date requirements of 5 U.S.C. Section 553 is unnecessary.

6. In view of the foregoing, IT IS ORDERED, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, that effective February 27, 1974, Section 89.117(b) and 93.109(b) of the Commission's Rules are amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

A. Part 89 of the Commission's Rules is amended as follows:

Section 89.117(b) is amended to read as follows:

Section 89.117 Acceptability of transmitters for licensing.

(a) * * *

(b) Each transmitter marketed as specified in Section 2.803 of Part 2 of this chapter or utilized by a station authorized for operation under this part must be of a type which is included in the Commission's current Radio Equipment List and is designated for use under this part or be of a type which has been type accepted by the Commission for use under this part. As exceptions to these requirements, type acceptance is not required for the following:

(1) Transmitters used in developmental stations.

(2) Transmitters in police zone and interzone stations authorized as of January 1, 1965.

(3) Transmitters used in radiolocation stations authorized prior to January 1, 1974.

(4) Radiolocation transmitters marketed as specified in Section 2.805 of Part 2 of this chapter prior to January 1, 1974.

* * * * * * *

B. Part 93 of the Commission's Rules is amended as follows:

Section 93.109(b) is amended to read as follows:

Section 93.109 Acceptability of transmitters for licensing.

(a) * * *

(b) Each transmitter marketed as specified in Section 2.803 of Part 2 of this chapter or utilized by a station authorized for operation under this part must be of a type which is included in the Commission's current Radio Equipment List and is designated for use under this part or be of a type which has been type accepted by the Commission for use under this part. As exceptions to these requirements, type acceptance is not required for the following:

(1) Transmitters used in developmental stations.

(2) Transmitters used in radiolocation stations authorized prior to July 1, 1974.

(3) Radiolocation transmitters marketed as specified in Section 2.805 of this chapter prior to July 1, 1974.

* * * * * * *

F.C.C. 74–118

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of T–V TRANSMISSION, INC., SEWARD, NEBR. For Certificate of Compliance	CAC–2589 NE035

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION:

1. On May 18, 1973, T–V Transmission, Inc. (T–V) filed the above-captioned application for a certificate of compliance to add two television broadcast signals to its existing cable television system at Seward, Nebraska, a community located within the Lincoln-Hastings-Kearney, Nebraska major television market (#91).[1] The system has been in operation since May 21, 1967, and is presently carrying the following television broadcast signals:

KMTV (NBC, Channel 3)	Omaha, Nebr.
KHAS–TV (NBC, Channel 5)	Hastings, Nebr.
WOW–TV (CBS, Channel 6)	Omaha, Nebr.
KETV (ABC, Channel 7)	Do.
KHQL–TV (ABC, Channel 8)	Albion, Nebr.
KUON–TV (Educational, Channel 12)	Lincoln, Nebr.
KOLN (CBS, Channel 10)	Do.

T–V has requested certification to add the following television signals:

KMBA–TV (Independent, Channel 41)	Kansas City, Mo.
KWGN–TV (Independent, Channel 2)	Denver, Colo.

T–V's application is opposed by the City of Seward, Nebraska.

2. The franchise under which T–V has been operating for the last seven years was granted by the City of Seward on February 2, 1965. In its objections to the manner in which T–V has been carrying out its responsibilities under the franchise, the City contends that: the franchise Ordinance No. 712 granted by it is not consistent with the franchise standards of Section 76.31 of the Commission's Rules; authorization to carry additional signals should be subject to approval by the City; the Commission should enforce the availability by January 1, 1974 of three VHF access channels for educational, public, and local government use; the cable system's rules for operation of the access channels should be subject to approval by the City prior to consideration of the application for carriage of additional signals; Lincoln Telephone and Telegraph Company (Lincoln, Nebraska), the owner of T–V, should be required to submit a plan immediately to the Commission and the City for the divestiture of T–V; and the

[1] The Seward system consists of approximately 20 miles of cable which passes about 1,400 dwelling units. It currently has a 12 channel capacity.

City should be notified prior to the filing of any request for waiver of the divestiture requirements or, if the Commission so determines, no later than seven days after the filing of the waiver request.

3. It is clear from these objections that the City of Seward feels aggrieved by some of T–V's conduct and is looking to the Commission for redress. We are always concerned when a franchising authority objects. Were we dealing with a franchise granted after March 31, 1972, we could measure that document and the conduct in question against our new rules and require immediate, full compliance. However, the Commission resolved most of the questions raised by the City when it promulgated the cable television rules, and determined to defer compliance with the franchise standards of Section 76.31 of the Rules until March 31, 1977 for systems in operation prior to March 31, 1972, whose franchises expire after March 31, 1977. As the *Cable Television Report and Order*, 36 FCC 2d 143, 210, indicates, careful consideration of the franchise issue led us to believe that "(T)his deferral should relieve both cable systems and local authorities of whatever minor dislocations our Rules might otherwise cause." Since T–V's current franchise expires on February 2, 1985, it is subject to the March 31, 1977 franchise compliance date.

4. The Commission also considered immediate implementation of access requirements for existing cable systems. Although we encourage these nonbroadcast community services, we were not unmindful of the severe burden the access requirements would place on mature systems which were built with limited channel capacity. Upon reconsideration of the rules, we noted the complaint of a number of system operators that the mandatory addition of large numbers of access channels would require most existing systems to rebuild substantially or even completely at great capital costs. We also noted that additional broadcast signals might provide some revenue base to underwrite such a rebuilding program at a later date. *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 357–359. We therefore decided to balance the equities. Full compliance with the access requirements of Section 76.251 of the Rules was deferred until March 31, 1977. In the interim, systems which add non-local independent signals to their carriage complement are required to provide one access channel for each such signal added and then only in the following order of priority: (1) public access, (2) educational access, (3) local government access, and (4) leased access (Section 76.251(c)). For each such channel provided, the system operator must establish operating rules pursuant to Section 76.251(a)(11). As the *Cable Television Report and Order*, 36 FCC 2d 143, 193, indicates, we have proscribed further regulation by state and local entities in hopes of fostering a more conducive climate for experimentation and development. We see no justification in the City of Seward's arguments to depart from our stated policy. This policy would also preclude requiring that access channels be carried on a bandwidth specified by the franchise authority. T–V has applied for two additional television signals, and its proposal to provide a public and an educational access channel complies with the Commission's access rules. It also has provided the Commission with the requisite operating rules. As with access cablecasting, the Commission likewise believes that a cable operator's signal carriage decisions should

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be left undisturbed by state and local entities. *See* Paras. 88–93, *Cable Television Report and Order*, 36 FCC 2d 143, 176–179.

5. In the *Final Report and Order in Docket No. 18509*, 21 FCC 2d 307 (1970), the Commission promulgated rules prohibiting a telephone company from furnishing cable television service directly or through an affiliate within the operating territory of the telephone company. With respect to existing operations, the Commission granted a four year extension until March 16, 1974. (Section 64.601.) Hence, we consider the City of Seward's request for immediate divestiture of T–V by Lincoln Telephone and Telegraph Company to be premature. Moreover, we believe that the public interest would be adversely affected if we were to deny otherwise authorized signals to the applicant during the grace period. The Commission also has expressly provided for waiver of the divestiture rules upon a showing that cable service could not exist in a community except through a cable system related to or affiliated with the local telephone company. Indeed, on November 1, 1973, Lincoln Telephone and Telegraph Company petitioned the Commission for waiver of the divestiture requirement of Section 64.601 of the Rules (W–602–34). The City of Seward has been notified of the filing of this petition and has received a copy of it. Disposition of the petition will occur in a separate proceeding.

In view of the foregoing, we find that a grant of T–V Transmission, Inc.'s application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Response to Application of T–V Transmission, Inc. (Seward, Nebraska) for Certificate of Compliance," filed by the City of Seward, Nebraska, IS DENIED.

IT IS FURTHER ORDERED, That "Application for Certificate of Compliance" (CAC–2589) filed by T–V Transmission, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-98

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
UNIVERSAL TELEVISION CABLE SYSTEM, INC., EDWARDSVILLE BOROUGH, PA.	CAC-1907 PA89A
UNIVERSAL TELEVISION CABLE SYSTEM, INC., FORTY FORT BOROUGH, PA.	CAC-1908 PA90A
UNIVERSAL TELEVISION CABLE SYSTEM, INC., PLAINS TOWNSHIP, PA.	CAC-1909 PA91A
UNIVERSAL TELEVISION CABLE SYSTEM, INC., WEST WYOMING BOROUGH, PA.	CAC-1910 PA92A
UNIVERSAL TELEVISION CABLE SYSTEM, INC., LUZERNE BOROUGH, PA.	CAC-1911 PA93A
UNIVERSAL TELEVISION CABLE SYSTEM, INC., EXETER BOROUGH, PA.	CAC-1912 PA684
UNIVERSAL TELEVISION CABLE SYSTEM, INC., WYOMING BOROUGH, PA.	CAC-1913 PA48A
UNIVERSAL TELEVISION CABLE SYSTEM, INC., PLYMOUTH BOROUGH, PA.	CAC-1924 PA47B
UNIVERSAL TELEVISION CABLE SYSTEM, INC., OLD FORGE BOROUGH, PA.	CAC-1925 PA46B
UNIVERSAL TELEVISION CABLE SYSTEM, INC., CITY OF NANTICOKE, PA.	CAC-1926 PA45B
UNIVERSAL TELEVISION CABLE SYSTEM, INC., AVOCA BOROUGH, PA.	CAC-1927 PA44B
UNIVERSAL TELEVISION CABLE SYSTEM, INC., MOOSIC BOROUGH, PA.	CAC-1928 PA43B
UNIVERSAL TELEVISION CABLE SYSTEM, INC., TAYLOR BOROUGH, PA.	CAC-1929 PA42B
UNIVERSAL TELEVISION CABLE SYSTEM, INC., SWOYERSVILLE BOROUGH, PA.	CAC-2437 PA90B
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 7, 1974)

BY THE COMMISSION:

1. On February 7, 1973, Universal Television Cable System, Inc., filed the above-captioned application for certificates of compliance to operate 27-channel cable television systems at fourteen Pennsylvania communities, all located within the Wilkes-Barre-Scranton, Pennsylvania, television market (#49). Universal proposes to offer the following television broadcast signals:

WNEP–TV (ABC, Channel 16)	Scranton, Pa.
WBRE–TV (NBC, Channel 28)	Wilkes-Barre, Pa.
WDAU–TV (CBS, Channel 22)	Scranton, Pa.
WVIA–TV (Educational, Channel 44)	Do.
WOR–TV (Independent, Channel 9)	New York, N.Y.
WPIX (Independent, Channel 11)	Do.
WPHL–TV (Independent, Channel 17)	Philadelphia, Pa.

The applications are unopposed and carriage of the proposed signals is consistent with Section 76.61 of the Rules.

2. Universal seeks a waiver of Section 76.251 [1] of the Commission's Rules insofar as it requires cable television systems operating in major markets to maintain separate public, governmental, and educational access channels for each system.[2] It states that it proposes to serve 13 communities (excluding Exeter Borough from consideration) from three headends in the following manner:

(a) Headened one is to be composed of four communities.[3] They will share the use of three access channels: one public, one education, and one local government. A local origination center, with all necessary equipment and facilities needed for the production of programming, will be maintained at the headend site. Additionally, a fully equipped mobile unit will be made available to the communities to facilitate and encourage the production of programming. In support of its waiver request, Universal argues that the heritage of the residents and the geography of the communities have created an extensive community of interest: the current residents are primarily descendents of Western European immigrants (Welsh, English, Italian, Irish, and Slavonic) whose principal occupation was the mining of coal; the geography of the communities is such that they are virtually indistinguishable, creating an interest in and a dependence upon the hub city of Scranton by the residents as evidenced by their telephone numbers being listed in the Scranton directory; they frequent the same large department stores, zoo, public park, museum, theaters, and other locations of public activity; they attend the two colleges in the City of Scranton; and the hospitals of Scranton are used by the physicians of the four bor-

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[1] Section 76.251(a) provides that cable television systems operating in major markets must offer, *inter alia:*

(4) *Public access channel.* Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel. See also § 76.201;

(5) *Education access channel.* Each such system shall maintain at least one specially designated channel for use by local educational authorities;

(6) *Local government access channel.* Each such system shall maintain at least one specially designated channel for local government uses;

[2] Universal asks that we also consider the access proposal for Exeter Borough even though that system's franchise has been revoked. The franchise submitted with the application was cancelled by the Borough Council on April 24, 1973, and has not been reinstated. Since Universal contests the legality of the Council action and is challenging it before local authorities, we will defer action on that application, making any consideration of Exeter's access proposal at this time premature.

[3] The City of Scranton, Pennsylvania, which has already obtained a certificate of compliance, will also be served from what will be referred to as headend one. It will have available four access channels: one public, one education, and two local government. *See Verto Corp.*, FCC 72–1007, 38 FCC 2d 963 (1972). The communities to share access channels are:

Community:	*Population*
Old Forge Borough	9,522
Taylor Borough	6,977
Moosic Borough	4,273
Avoca Borough	3,543
Total	24,315

oughs as the principal health care facility for their patients. Finally, it is noted that the Boroughs of Taylor and Moosic are in the same school district and that the production facilities to be shared by the communities are in all cases within five miles and served by excellent access roads.

(b) Headend two will serve seven communities.[4] Universal proposes to share one set of three access channels (public, educational, governmental) among the communities of Edwardsville Borough, Luzerne Borough, Forty Fort Borough, Swoyersville Borough, West Wyoming Borough, and Wyoming Borough; 2) provide one set of three access channels for Plains Township; 3) provide one fixed set of local origination facilities to be shared by all seven communities; and 4) provide a mobile production unit to be shared by all the communities on all three headends. In support of this request, Universal states that most of the residents are descendants of immigrants from Western Europe who settled as miners of anthracite coal; the total population of all seven is approximately 42,372—30,891 in the six for which the shared access is proposed; geographically, all are in very close proximity to each other, the community most distant from the headend being four miles away; all the communities for which shared access is proposed are located on the west side of the Susquehanna River, are connected by Pennsylvania Highway Route 11, and are so close together it is difficult to discern where one ends and the next begins; the residents use common transportation facilities and utilities and follow the same cultural, recreational, and social activities; and Edwardsville Borough, Luzerne Borough, Forty Fort Borough, and Swoyersville Borough are in the same school district (Wyoming Valley West), as are West Wyoming Borough and Wyoming Borough (Wyoming area), while Plains Township, for which its own set of access channels has been proposed, is on the east side of the Susquehanna River and is part of the Wilkes-Barre school district.

(c) Headend three will include the City of Nanticoke (population 14,632) and Plymouth Borough (population 9,536). Each community will have its own set of access channels and will share a joint local origination center. Universal states that the public transportation and access roads between the communities and the origination center (a distance of not more than two miles) are excellent, and that each community will also share the mobile unit.

In all cases, Universal has promised to provide additional access channels as the need arises, and states that no community will be more

[4] The communities are:

Community:	*Population*
Edwardsville Borough	5,633
Luzerne Borough	4,504
Forty Fort Borough	6,114
West Wyoming Borough	3,659
Wyoming Borough	4,195
Swoyersville Borough	6,786
Total	30,891
Plains Township	11,481
Total	42,372

than five miles from an origination center.[5] In addition to serving the access proposal on all parties, as required by Section 76.13 of the Rules, the president of Universal personally communicated with all of the superintendents of schools of the districts involved and all stations placing Grade B signals over the communities. All consented to Universal's advising the Commission that they have no objection to the access plan.

3. We believe the access proposal offered by Universal is reasonable and consistent with our previous decisions concerning the sharing of access channels and production facilities in new conglomerate systems.[6] In approving Universal's access proposal, we take particular cognizance of the following: Since Universal will be providing seven signals on its 27-channel systems, the remaining 20 channels are available for access services, should the demand arise. Regarding the sharing of origination facilities, we note that all of the communities will be within five miles of the origination facilites at the respective headends. The mobile unit will supplement these facilities and we expect it to make the access channels truly accessible. Finally, since several of the proposed systems' franchises were granted prior to March 31, 1972, and only substantially comply with our Rules (*see* Paragraph 4, *infra*), our certification of those operations, in accordance with the note to Section 76.13(a)(4) of the Rules, will extend only until March 31, 1977.[7] We shall, at the time Universal applies for recertification, expect Universal to demonstrate that its proposal has been successful and has operated in the public interest.

4. The franchises, as amended, of the boroughs of Old Forge, Moosic, Taylor, Wyoming, and Swoyersville, and the City of Nanticoke, all granted after March 31, 1972, fully comply with Section 76.31 of the Rules, and our certification will extend for the duration of the respective grants. We note the following variations from Section 76.31 in

[5] The communities proposed to be served, grouped by headend, and the mileage between the communities and the origination center for each headend are as follows:

Headend 1	*Headend 2*	*Headend 3*
Old Forge Borough (9,522) 4 miles	Edwardsville Borough (5,633) 2 miles	City of Nanticoke (14,632) 0 miles
Taylor Borough (6,977) 3¾ miles	Luzerne Borough (4,504) 1 mile	Plymouth Borough (9,536) 2 miles
Moosic Borough (4,273) 3 miles	Forty Fort Borough (6,114) 1 mile	
Avoca Borough (3,543) 5 miles	West Wyoming Borough (3,659) 2 miles	
[Headend located at Scranton]	Plains Township (11,481) 5 miles	
	Wyoming Borough (4,195) 2 miles	
	Swoyersville Borough (6,786) 0 miles	

[6] *See, e.g., Theta Cable of California*, FCC 73–826, 42 FCC 2d 387 (1973), (new system permitted to share one governmental, one public and four educational access channels among four communities); *Regional Cable Corp.*, FCC 73–123, 39 FCC 2d 494 (1973), (new system permitted to share three access channels among three systems); *Saginaw Cable TV Co.*, FCC 73–121, 39 FCC 2d 496 (1973), (new system permitted to share three access channels among four communities); *Stark County Communications, Inc.*, FCC 72–1189, 38 FCC 2d 1147 (1972), (new system permitted to share three access channels among four communities).

[7] The communities and the dates of their franchise grants are:

Avoca Borough	Mar. 17, 1972
Edwardsville Borough	Mar. 21, 1972
Forty Fort Borough	Jan. 15, 1972
Luzerne Borough	Feb. 15, 1972
Plains Township	Feb. 5, 1972
West Wyoming Borough	Mar. 9, 1972
Plymouth Borough	Feb. 12, 1972

the remaining franchises: none of these franchises contains recitations concerning the proceedings at which the franchises were awarded (however, Universal provides assurances that the franchises were awarded upon proper consideration of its qualifications in public proceedings); Edwardsville Borough, Forty Fort Borough, and Luzerne Borough do not require significant construction within one year of FCC certification, although Universal states it will perform accordingly; Edwardsville Borough, Forty Fort Borough, Plains Township, and Plymouth Borough have franchise terms of 25 years; and, while none of these franchises provides for local offices or complaint procedures, Universal promises it will maintain local offices for the handling of complaints. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973), we find that these franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the related applications until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications and waiver of Section 76.251 of the Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application[s] for Certificate[s] of Compliance" filed by Universal Television Cable System, Inc., for the Pennsylvania boroughs of Edwardsville, Forty Fort, West Wyoming, Luzerne, Wyoming, Plymouth, Old Forge, Avoca, Moosic, Taylor, and Swoyersville, and the City of Nanticoke, and Plains Township ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That action on the application for Exeter Borough, filed by Universal Cable Television System, Inc., IS DEFERRED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–122

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WARNER–TVC CORP., KENYON MOUNTAIN, OREG. AND BLUE RIDGE MOUNTAIN, OREG. For Voluntary Assignment of License and Request for Special Relief	CALCAR–17

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 14, 1974)

BY THE COMMISSION:

1. On June 3, 1970, the Commission ordered Television Communications Corp., now known as Warner–TVC Corp., to provide carriage and simultaneous program exclusivity [1] for Station KOBI–TV, Medford, Oregon (ABC/CBS), on its cable television systems at Coos Bay, Eastside and North Bend, Oregon.[2] Following this decision, KOBI–TV was unable to deliver its signal to Warner's headend without material degradation due to electrical interference. Cable Television Relay Stations (CARS) appeared to be the most expeditious and efficient means of delivery, but Warner was financially unable to construct such a system. Under these circumstances, the Commission granted Warner a construction permit and subsequent license [3] with the knowledge and understanding that Warner was merely an "accommodation licensee" and that KOBI–TV would be the operator of the system as well as the owner of the equipment and facilities incidental thereto.[4] The stations are presently in operation, but KOBI–TV is unable to acquire the necessary right-of-way permits for permanent use of the public lands used by the stations because the Bureau of Land Management, Department of the Interior, will not grant such authorizations for use of said lands except to the true party in interest, namely KOBI–TV. The Department of the Interior further requires that all licenses issued by governmental agencies related to the use of the right-of-way permits be in the name of the true party in interest. Consequently, it is asserted that the Department of the Interior's temporary use permits, issued to KOBI–TV, soon will expire, and the applicant requests a waiver of Section 78.13 of the Commission's Rules in order to continue pro-

[1] *Bay Television*, FCC 70–584, 23 FCC 2d 266.
[2] Warner's systems presently serve 8,600 subscribers.
[3] CPCAR–289 (WKG–61, 62), February 15, 1972; CLCAR–156 (WKG–61, 62), August 31, 1972.
[4] The Commission received copies of the agreement between Warner–TVC and KOBI–TV, and they are contained in the license files.

viding high-quality service of KOBI–TV to Warner's subscribers.[5]

2. While this is an unusual request, we believe that, because of the uniqueness of the facts, it is in the public interest to grant a waiver. We previously have encouraged cable systems and television stations to settle disputes as to exclusivity and carriage privately.[6] And a waiver would certainly be consistent with this policy. Moreover, denial of the waiver would result in a poor signal for Warner's subscribers—a situation which is hardly in the interests of the subscribers, Warner, or KOBI–TV, and contrary to the results intended by our earlier ruling concerning these parties. And though Section 78.13 is no technicality, it was never intended to prohibit good faith cooperation between a cable system and a television station.

In view of the foregoing, the Commission finds that a grant of the subject application for voluntary assignment of a cable television relay station license and of the requested waiver would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned application (CALCAR–17) IS GRANTED, and appropriate licenses for a cable television relay station will be issued.

IT IS FURTHER ORDERED, That the request for waiver filed by Warner–TVC Corporation IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[5] Section 78.13 of the Rules provides in part that:
"A license for a cable television relay station will be issued only to the owner of a cable television system or to a cooperative enterprise wholly owned by cable television owners or operators."

[6] See Paragraph 56, *Second Report and Order in Docket No. 14895, et al.*, 2 FCC 2d 725 at 749 (1966).

104-026—74——12

F.C.C. 74R–51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WILLIAM D. HELM, 267 CHENERY STREET, SAN FRANCISCO, CALIF. 94131 Order To Show Cause Why the License for Radio Station WB6DMF/1 Should Not Be Revoked and Suspension of Amateur Radio Operator License WB6DMF/1	Docket No. 19705

APPEARANCES

Eugene F. Mullin, on behalf of William D. Helm; *Arthur A. Anthony, III*, and *Robert S. Jacobs*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted February 11, 1974; Released February 15, 1974)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND PINCOCK.

1. By separate Orders, released January 29, 1973, the Commission, by the Chief, Safety and Special Radio Services Bureau acting pursuant to delegated authority: (a) directed William D. Helm to show cause why the license for his Amateur Radio Station WB6DMF/1 should not be revoked; and (b) suspended Helm's Amateur Radio Operator License WB6DMF/1. Both Orders alleged that Helm had: repeatedly violated Commission Rule 1.89 [1] by failing to respond to an Official Notice of Violation within ten days; transmitted false or deceptive communications by radio in violation of Rule 97.121; [2] and broadcast communications in violation of Rule 97.113.[3] The prehearing conference and hearing were held on May 7, 1973 in Boston, Massachusetts,[4] and the record was closed on the same day. Helm ap-

[1] Rule 1.89(b) provides that a licensee shall send a written answer to an Official Notice of Violation within ten (10) days of receipt of such notice to the office of the Commission originating the notice and that if an answer cannot be sent by reason of illness or unavoidable circumstances, the answer shall be made at the earliest practicable date with a satisfactory explanation of the delay.

[2] Rule 97.121 provides that no radio operator shall transmit false or deceptive signals or communications by radio.

[3] Rule 97.113 provides that an amateur radio station shall not be used to engage in any form of broadcasting, *i.e.*, the dissemination of radio communications intended to be received by the public directly or by the intermediary of relay stations, unless, as provided by Rule 97.91, the communication is an emergency communication. Rule 97.3(x) defines emergency communications as any amateur radio communication directly relating to the immediate safety of life or the immediate protection of property.

[4] Although this proceeding is captioned as "San Francisco, California", the hearing was held in Boston, Massachusetts, at Helm's request since he had moved from San Francisco to Boston.

peared *pro se* [5] and testified. In an Initial Decision, FCC 73D–54, released October 16, 1973, Chief Administrative Law Judge Arthur A. Gladstone concluded that Helm had violated Rules 1.89 and 97.113 [6] and ordered that Helm's station license be revoked and his operator license suspended. Now before the Board is a "Motion to Hold Proceeding in Abeyance (or, Alternatively, Exceptions and Brief)", filed December 12, 1973, by Helm.

2. Helm requests that the Board hold the proceeding in abeyance for a period of at least six months while he is receiving weekly medical treatment.[7] According to counsel, Helm is unable to "concentrate on, or cope with, the appeal at the present time and, in fact * * * has been advised by persons in charge of his treatment that he is unable to do so." While we sympathize with Helm's position, we do not believe that he demonstrated that he will suffer irreparable injury or that the public interest will be adversely affected if the proceeding is not held in abeyance.[8] *Cf. Capitol Broadcasting Company*, 1 FCC 2d 376, 5 RR 2d 706 (1965). In particular, Helm has provided no information regarding the length of time needed for his complete recovery or whether the therapy and treatment he is now receiving will ever result in his complete recovery. In light of the above, Helm's request for a stay of the proceeding will be denied.

3. We have reviewed the Initial Decision in light of Helm's exceptions and supporting brief,[9] and find the Presiding Judge's findings of fact to be accurate and complete and his conclusions of law supported by the findings.[10] The ultimate conclusions are likewise supported by the record. The Presiding Judge has, in our opinion, adequately dealt with the arguments raised in the exceptions and no useful purpose would be served by further discussion here.[11] Therefore, Judge Gladstone's Initial Decision is adopted.

4. Accordingly, IT IS ORDERED, That the stay request contained in the "Motion to Hold Proceeding in Abeyance (or, Alternatively, Exceptions and Brief)", filed December 12, 1973, by William D. Helm, IS DENIED; and

[5] Arrangements were made by Eugene F. Mullin, former President of the Federal Communications Bar Association, to provide local counsel for Helm in Boston. However, Helm decided to appear on his own behalf. On July 27, 1973, Mr. Mullin filed a notice of appearance on Helm's behalf and has continued to represent him in this proceeding.

[6] The Judge concluded that Helm did not violate Rule 97.121 "in view of respondent's sincere belief in respect to the 'facts' he transmitted."

[7] There are two statements attached to Helm's motion: one from a Social Worker who states that Helm applied for and was granted Disability Assistance on July 6, 1972; and the other from a psychiatrist who states that Helm was totally disabled as of November 5, 1973, suffering from schizophrenia-paranoia, and in need of therapy.

[8] In this regard, the Presiding Judge recommended that should Helm later "submit satisfactory medical/psychiatric evidence" of mental competence, the instant decision should not be held to his prejudice.

[9] We are granting Helm's request that his previously filed "Response to Proposed Findings and Conclusions", filed with Judge Gladstone on August 27, 1973, be deemed a brief in support of exceptions.

[10] The Safety and Special Radio Services Bureau did not file a response to the instant pleading or a statement in support of the Initial Decision, but did recommend revocation and suspension of Helm's licenses in its proposed findings and conclusions.

[11] No request for oral argument was made and an oral argument does not appear to be warranted. Our rulings on Helm's three exceptions may be found in the Appendix attached hereto.

Note.—Operation of the radio station specified above after the effective date of license revocation as ordered herein will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person operating such station to the penal sanctions specified in Section 501 of the Communications Act. Within thirty days of the release date of this Order of Revocation, a petition for reconsideration thereof by the Review Board may be filed pursuant to the provisions of Section 1.106 of the Commission's Rules, 47 C.F.R. 1.106, or an application for review thereof by the Commission may be filed pursuant to the provisions of Section 1.115 of the Commission's Rules, 47 C.F.R. 1.115.

5. IT IS FURTHER ORDERED, That, effective April 1, 1974, Amateur Radio Station License WB6DMF/1 issued to William D. Helm IS REVOKED; and that Amateur Radio Operator License WB6DMF/1 issued to William D. Helm and scheduled to expire on September 23, 1974, IS SUSPENDED for the balance of the license term; and that copies of this Order of Revocation and Suspension SHALL BE served by Certified Mail, Return Receipt Requested, upon William D. Helm at his last known address, 3 Elmer Street, Cambridge, Massachusetts, and in care of his attorney of record, Eugene F. Mullin, Mullin, Connor & Rhyne, 307 Southern Building, Washington, D.C. 20005; and

6. IT IS FURTHER ORDERED, That operation of Radio Station WB6DMF/1 SHALL BE TERMINATED upon the effective date of the license revocation specified above, and that, immediately upon such effective date of the license revocation, the licensee shall forward his radio station license to the Commission for cancellation.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON,
Member, Review Board.

APPENDIX

Rulings on Exceptions of William D. Helm

Exception No.	*Ruling*
1	*Denied.* The record evidence fully supports the Judge's conclusion that Helm's communications were not "emergency" communications within the meaning of Section 97.3(x) of the Commission's Rules, and therefore, constituted violations of Rule 97.113. See paragraphs 1–3 of the Judge's conclusion.
2	*Denied.* The record evidence supports the Judge's conclusion that Helm violated Rule 1.89 by failing to respond to the Official Notices of Violation and follow-up letters within ten days. See paragraph 5 of the Judge's conclusions.
3	*Denied.* The record evidence supports the Judge's ultimate conclusion that Helm's station license be revoked and his operator's license suspended.

F.C.C. 73D–54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WILLIAM D. HELM, 267 CHENERY STREET, SAN FRANCISCO, CALIF. 94131 Order To Show Cause Why the License for Radio Station WB6DMF/1 Should Not Be Revoked and Suspension of Amateur Radio Operator License WB6DMF/1	Docket No. 19705

APPEARANCES

Arthur A. Anthony, III. and *Robert S. Jacobs*, Esqs., on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission; *William D. Helm, pro se*, at the hearing; *Eugene F. Mullin*, Esq., on behalf of Helm, after the close of the hearing.

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE ARTHUR A. GLADSTONE

(Issued October 4, 1973; Released October 16, 1973)

PRELIMINARY STATEMENT

1. By Order released January 29, 1973, the Commission [1] directed William D. Helm to show cause why the license for radio station WB6DMF/1 in the Amateur Radio Service should not be revoked. On the same date, the Commission issued a separate Order suspending the respondent's Amateur radio operator license for station WB6DMF/1. Both orders alleged that the respondent repeatedly violated Section 1.89 of the Commission's Rules by failing to respond to an Official Notice of Violation mailed April 20, 1972, and a follow-up letter dated May 12, 1972, both mailed to his last known address and requiring a response within 10 days. The orders also alleged that, on March 23, 1972, the respondent transmitted false or deceptive communications by radio in violation of Section 97.121 of the Commission's Rules, and engaged in broadcast communications in violation of Section 97.113 of the Commission's Rules.

2. The respondent requested a hearing in Boston, Massachusetts, by letter dated February 21, 1973.[2] An order setting the matter for

[1] Issued by the Chief, Safety and Special Radio Services Bureau, pursuant to delegated authority.

[2] Pending final decision herein, the operator license suspension was stayed.

hearing was issued March 12, 1973. The prehearing conference and hearing were held on May 7, 1973, in Boston and the respondent appeared, *pro se*, and testified. The record was closed on the same day.

BACKGROUND

3. To achieve a full understanding of this case some background exposition is necessary. In late April, 1973, the Presiding Judge received two communications from the respondent. These communications displayed respondent's total lack of understanding of the Commission's procedures and revealed that he was, by conventional standards, mentally disturbed. Additionally, one of the communications contained a request to delay the proceeding so that respondent might obtain counsel. Sensing that this was a case of the kind where adequate representation on a *pro-bono* basis would be desirable and appropriate, the Presiding Judge placed upon the Bureau the burden of canvassing the possibility of getting the Federal Communications Bar Association to provide counsel for respondent in Boston.[3] Through the good offices of the then President of the Association, Eugene F. Mullin, arrangements were made, on a tentative basis, for respondent to have local counsel in Boston and he was so apprised. However, respondent chose not to avail himself of this assistance and appeared in his own behalf.[4] Following the close of the hearing, Mr. Mullin persisted in his efforts to be of assistance to respondent and succeeded in achieving permission to represent him in respect to the filing of proposed findings and conclusions herein, and, hopefully, any appropriate subsequent procedural steps.[5]

4. This case presents a relatively simple factual question. Respondent sincerely believes that there are "beings" or "bodies" floating in space, capable of passing through such material objects as walls, floors, etc., as well as floating in the atmosphere. These "beings" or "bodies" apparently are in human form. Perhaps the best analogy would be to designate them, in conventional terms, as ghosts. Respondent asserts that he can and does see such "beings", that they are commonly about. He is of the further belief that these "beings" are benign and mean us more substantial beings no harm. He believes that some humans (a minority) are capable of seeing these "beings", that such humans are frightened by what they see because they do not comprehend the situation, and that, in their fright, they are driven to suicide, madness, or other self-harm. Respondent believes that he has proven his theses in some sort of pseudo-scientific fashion and that his beliefs and conclusions are supported by certain scientific studies and personages.

5. To alert the general population of the country to the existence of this benign phenomenon and to allay the fears of those who might otherwise suffer or do themselves an injury in fear and ignorance of the facts, respondent has used licensed Amateur radio facilities to "broadcast" an "emergency" alert and an explanation of the situation.

6. In the response to Bureau's proposed findings of fact and con-

[3] See *Memorandum Opinion and Order*, issued April 27, 1973 (FCC 73M-518; Mimeo. No. 00576).

[4] See Tr. pp. 2-5, inc.

[5] We cannot thank Mr. Mullin too much, nor commend him too highly, for the selfless and persistent time, effort, and funds he has expended in this *pro-bono* effort.

clusions, counsel for respondent does not substantially take issue with the facts as hereinafter set forth, he merely, albeit ably, takes issue with the legal conclusions allegedly flowing therefrom and argues in mitigation of the proposed sanctions.

FINDINGS OF FACT

7. William D. Helm is the licensee of radio station WB6DMF/1 in the Amateur Radio Service. He has general class operating privileges. His current license term is from September 23, 1969, to September 23, 1974.

8. Robert F. Singleton is an electronics technician who has been employed by the Commission for approximately five and a half years. He has worked at the Commission's Belfast Monitoring Station for approximately two years. He also holds licenses from the Commission for an Amateur radio station and third class radiotelephone operator's permit. On March 23, 1972, Singleton was on duty at the Belfast station when, for approximately one hour and three minutes, he monitored the transmissions of an operator on the Amateur frequency 7259.23 kHz. The operator identified his station by the call sign WB6DMB/1 (the designation of a portable unit). He also stated that he could be reached by contacting Harvard radio station W1AF.[6]

9. The observed communications were directed to "CQ emergency" and to anyone in the Dunkirk, New York area. They were, for the most part, unilateral communications, since during only approximately 10 or 12 minutes of the total of one hour and three minutes on the air was the conversation with other operators who would respond, talk briefly, and then break contact, calling Helm a "nut". The transmissions were essentially a repetition of the same theme. Singleton at first thought that Helm was reading from a card, punctuated by occasional brief pauses. The following is typical of those transmissions:

*** * * CQ CQ CQ emergency transmission CQ CQ CQ ah this is W Baker 6 delta mexico foxtrot portable 1 calling CQ CQ CQ emergency transmission to any one in the Dunkirk New York State area or anyone any amateur on frequency that cares about the health and welfare of other people this is WB6DMF/1 ah this emergency transmission does concern ah the lives of thousands of innocent people ah their health and welfare and if any amateur on frequency would like to check into the credentials check into the information please do this is WB6DMF/1 standing by (pause) CQ CQ CQ emergency transmission to anyone in the New York State area in Dunkirk New York ah in Dunkirk New York or any one any amateur on frequency that cares about the health and welfare of other American people * * *.**

10. Helm readily admitted making the transmissions described above. Moreover, he admitted that he had been making similar emergency calls every day for some time, and had occasionally spent as much as four hours at a time making these calls and receiving no response. He had also reported the "emergency" to local police departments and had "* * * openly advised them to arrest me, either on calling false emergency charges or, at least, look into the matter more closely."

[6] Helm is unemployed and is not connected with Harvard, although he claimed to have presented research papers to officials at the Harvard observatory.

11. Joseph P. Casey is an electronics engineer who has been employed for two years in the Commission's Boston office. He has spoken with Helm on numerous occasions since about March 1972, when Helm first contacted the Boston office to request the Engineer-in-Charge at that office to declare an emergency on the Amateur frequencies. In those conversations, Helm informed Casey that he was continuing to call CQ emergency on the air. As a means of attracting more attention, he also inquired if it would be permissible for him to transmit on the international marine distress frequency. After a half hour conversation, Casey was able to convince Helm not to transmit on this frequency. On another occasion, on April 26, 1973, Helm told Casey that his intent was to gain as much publicity for his "emergency" as possible, and that he would prefer a jury trial. He inquired as to whether it would be sufficient to get a jury trial if he first informed the Commission, and then began transmitting continuously until he was physically forced to stop.

12. Helm maintains that a genuine emergency exists, which he analogizes to the emergency which would exist if a ship were at sea with a hole in its hull. Helm describes the emergency as relating to the fact that there are "beings" which he and other people have observed floating through ceilings and "floating through the atmosphere in clusters", about which the public must be made aware. Although these beings are not dangerous themselves, they present a danger to uninformed, unprepared persons who might see them and either harm themselves or be placed in institutions, and possibly lobotomized, because they are thought to be insane. Helm cites, as an example, that "* * * out of 20,000 Americans who died this last year here in this country; men, women and children, almost half of those people were accused of hallucinating."

13. For these reasons, Helm believes that he should use his radio to inform people of the danger—particularly people "involved in a technical field." Helm acknowledges that many people he talks to on the radio consider him a "kook". He agreed with the Presiding Judge, at the hearing, that the Amateur frequencies reached only a limited segment of the population and that a better way to get wider dissemination of his views might be through written articles and publication and distribution of documents.

14. As a result of his monitoring of Helm on March 23, 1972, Singleton issued an Official Notice of Violation, FCC Form 793, which was mailed to Helm on April 11, 1972. It was mailed to 267 Chenery Street, San Francisco, California 94131, which was Helm's address of record on file with the Commission. The Notice required a reply, within 10 days, explaining each cited violation and describing the action taken to prevent their continuation or recurrence. This Notice was returned to the Belfast office with the envelope marked "Moved, left no address".

15. In a further attempt to get the Notice of Violation to Helm, it was remailed to him on April 21, 1972, in care of the Harvard Wireless Club at Harvard University, the licensee of Amateur radio station W1AF, where Helm had stated over the air that he could be reached. Enclosed was a note asking that the Notice be delivered to Helm. In response to this note, the Belfast office received a letter from a trustee

of the Club stating that he had tried without success to contact Helm and deliver the Notice.

16. Thereafter, on May 12, 1972, a warning letter, FCC Form 794, was sent to Helm's San Francisco address instructing him to reply to the attached Official Notice of Violation and warning him that his failure to do so would be in violation of Section 1.89 of the Commission's Rules. This letter was also returned marked "Moved, left no address".

17. Helm resided at 267 Chenery Street, San Francisco, California, when he filed his most recent application in 1969. He maintains that that address is still his address of record; that he had only sublet his apartment; and that he had left instructions for his landlady to forward his mail to him when he moved to the Boston area.

18. Helm arrived in Cambridge, Massachusetts, on or before March 1972, where he first resided at 27 Putnam Avenue for approximately eight months and then moved to his current address, 3 Elmer Street. Helm asserts that, even though his address of record is still in San Francisco, he did notify the Commission of portable operation of his station. These notices are in the form of two post cards which were received at the Commission's Boston office.

19. The first notice was received by the Commission on April 5, 1972. It was on a QSL card of the Harvard Wireless Club. Helm indicated that his station location would be at the Harvard University Graduate Building between April 3 and August 30, 1972. However, as noted in Paragraph 15, the Commission was unable to effect delivery of the Official Notice of Violation mailed to Helm in care of The Harvard Wireless Club on April 21, 1972.

20. The second notice of address change by Helm was received on July 18, 1972, on a post card bearing a return address of #29 Putnam, Cambridge, Massachusetts 02138. The message on the card was:

"Dear Sir
Here or at the observatory
Harvard
Dr. Delgarno
Sincerely
Bill Helm"

21. Prior to the time of hearing, and at the time of hearing, respondent was, from time to time, under medical and psychiatric care. Presumably, he may seek further care and treatment in the future (see Response to Proposed Findings of Fact and Conclusions filed in respondent's behalf).

CONCLUSIONS

1. It is uncontroverted that respondent operated his Amateur station on March 23, 1972, as described in the Findings of Fact. He not only admitted that operation, but freely acknowledged it was only one instance of many such transmissions on other dates, sometimes for four-hour periods. It is also clear that Helm's transmissions were one-way "broadcast" communications directed to anyone who would listen. These broadcast communications, regardless of their content, are in violation of Section 97.113 of the Commission's Rules, unless we accept respondent's proposition that his transmissions concerned an emer-

gency and, thus, fall within the exception of Section 97.91(a) of the Commission's Rules.

2. Assuming, *arguendo*, the reasonableness of Helm's beliefs and conclusions concerning the existence of the "beings" he sees, and their possible effect upon others who may see them, the situation thus existing would not be one which would warrant the use of his Amateur radio station for emergency purposes within the meaning and intent of Sections 97.91(a) and 97.3(x) of the Commission's Rules. The latter section defines "emergency" communications as comprehending:

> Any Amateur radio communications directly relating to the *immediate* safety of life of individuals or the immediate protection of property. (Emphasis supplied.)

The alleged danger dealt with in this case did not involve "*immediate*" considerations of safety but, rather, a less urgent problem of "educating" the public in respect to the matters involved in respondent's communications. Moreover, the use of the Amateur radio frequencies could not, in respondent's own view, have been efficient or effective in meeting the problem which he confronted because of the limited audience available to his transmissions and the consistent rejection of his message by those who heard it. Accordingly, it is concluded that respondent's transmissions were not emergency communications within the meaning and contemplation of the Commission's Rules.

3. This use of the Amateur radio frequencies cannot be tolerated, and the public interest dictates that it not be permitted. Transmissions of this type seriously disrupt other proper uses of the frequencies by Amateurs and demean legitimate emergency communications in the Amateur band. Respondent admits that his communications are not taken seriously by other Amateurs. However, until such time as other Amateurs have listened to respondent's transmission, determined its nature, and arrived at the conclusion that there is no emergency, the frequencies are misused and their use by others is grossly impaired. Moreover, if this type of transmission continues, there is the risk of other Amateurs failing to take seriously, or even ignoring, true emergency calls.

4. Insofar as respondent is charged with violation of Section 97.121 of the Rules, which prohibits the transmission of false or deceptive communications, it must be concluded, in view of respondent's sincere belief in respect to the "facts" he transmitted, that there was no violation of this section of the Rules.

5. Respondent's failure to reply to Commission correspondence is clearly in violation of Section 1.89 of the Commission's Rules. Respondent claimed that this occurred because his mail was not forwarded to him as he had instructed. However, the Commission's Rules make it incumbent upon licensees of the Commission to take whatever steps are necessary to *insure* that they receive correspondence from the Commission and reply to it. (See Sections 1.5 and 97.47 of the Rules.) In view of his protracted and indefinite absence from his California address, reasonable and prudent action would have dictated a better forwarding arrangement than was accomplished. At the least, respondent could have, for example, instructed his local Post Office in California to forward his mail. The efficacy of *any* forwarding arrangement, however, is open to grave doubt in this case. Official notice

is taken of the fact that respondent did not keep current *anyplace* his place of abode or address in Boston during the pendency of this proceeding. This is evidenced by the fact that various Commission communications, mailed to him *pendente lite* at Boston addresses where he was known to have temporarily rested, were returned as undeliverable. Respondent moved his place of abode about in the Boston area with some frequency and left no forwarding information and instructions. Accordingly, it would appear that, had his landlady forwarded any mail, it, like Commission communications directed to him in Boston, would have been undeliverable. Respondent must bear the consequences for the failure which occurred in respect to the arrangements he made. The fact that respondent filed two portable operation notices (pursuant to Section 97.97 of the Rules) with the Commission's Boston office did not satisfy the requirements imposed by the Commission's Rules that he make arrangements to receive his mail on a continuing permanent basis. Moreover, the notices filed by respondent were, in fact, inadequate to enable Commission personnel to contact him on three occasions concerning operation of his radio station.

6. There remains for consideration the ultimate question as to whether respondent's Amateur radio station license should be revoked and his Amateur radio operator permit suspended. While respondent has indicated a *present* intention to desist from the type of operation herein complained of, taking into consideration his disturbed condition, we cannot give full weight and credence to the expectation that this *present* intention will remain *permanent*. There is a risk that he may be persuaded to try again to deal with the "emergency" by again using the Amateur facilities. We are convinced that the evidence clearly establishes that any sanction short of revocation would not suffice to insure the cessation of the so-called "emergency" transmissions. It is uncontroverted that respondent not only has used the Amateur radio service frequencies on the date alleged in the Order designating this proceeding for hearing, in violation of the Rules, but that he has engaged in similar transmission of long duration on numerous other dates. While we are sympathetic to the sincerity with which respondent holds to his beliefs, the ultimate resolution of the question as to what sanction to impose involves public interest considerations which are paramount.

Accordingly, IT IS ORDERED that, unless an appeal to the Commission from this Initial Decision is taken by any of the parties, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the license for Amateur Radio Station WB6DMF/1, and the Amateur Radio Operator License WB6DMF/1, both issued to William D. Helm, ARE HEREBY, respectively, REVOKED AND SUSPENDED, effective 5 days following the release of a final decision or Order herein.[6]

FEDERAL COMMUNICATIONS COMMISSION,
ARTHUR A. GLADSTONE,
Chief Administrative Law Judge.

[6] It is strongly recommended that, should respondent, at some future date, submit satisfactory medical/psychiatric evidence that he is no longer mentally disturbed, together with appropriate applications for Amateur radio station and operator's licenses, he be regularly issued such licenses in accordance with the then applicable procedures, rules and regulations and that this proceeding not be held to prejudice the favorable consideration and grant of such applications.

F.C.C. 74R-54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WVOC, INC., BATTLE CREEK, MICH.	Docket No. 19272 File No. BPH-7005
MICHIGAN BROADCASTING CO., BATTLE CREEK, MICH.	Docket No. 19273 File No. BPH-7045
For Construction Permits	

APPEARANCES

Eugene T. Smith, on behalf of WVOC, Inc.; *John J. Dempsey*, on behalf of Michigan Broadcasting Company; and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 12, 1974; Released February 15, 1974)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND PINCOCK.

1. This proceeding involves the mutually exclusive applications of WVOC, Inc. (WVOC) and Michigan Broadcasting Company (Michigan), each requesting a construction permit for a new Class A FM broadcast station at Battle Creek, Michigan. On June 29, 1971, the Commission, finding both applicants qualified, released an Order (36 FR 12642, published July 2, 1971), designating the applications for hearing under the standard comparative issue. The Commission stated therein that the need for the proposed program services of the applicants could be compared under the standard comparative issue because WVOC proposes substantial amounts of religious programming (thirty percent) while Michigan proposes to broadcast general market programming. By Memorandum Opinion and Order, released December 17, 1971 (32 FCC 2d 765, 23 RR 2d 371), the Review Board added an equipment and technical facilities issue against WVOC. In an Initial Decision, FCC 72D-62, released September 21, 1972, the late Administrative Law Judge Charles J. Frederick concluded that WVOC had met the qualifying issue specified against it, and, basing his conclusion on preferences given to WVOC under both diversification and integration criteria, recommended that WVOC's application be granted under the standard comparative issue. Exceptions to the Judge's resolution of the standard comparative issue, a supporting brief thereto, and a request for oral argument were filed by Michigan and, on November 10, 1972, WVOC filed a reply. Oral argument was held before a panel of the Review Board on December 11, 1973. We have reviewed the Initial Decision in light of Michigan's exceptions, WVOC's reply, the arguments of the parties and our examination of

the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and complete and his conclusions supported by the findings. We also agree with the ultimate conclusion reached by the Judge. Therefore, except as modified herein and in the rulings on exceptions contained in the attached Appendix, the Initial Decision is adopted. However, in light of the arguments of the parties in their exceptions and at oral argument, we believe that some amplification is warranted.

DIVERSIFICATION

2. At present, there are five broadcast facilities authorized to the city of Battle Creek.[1] WVOC is the licensee of daytime-only standard broadcast Station WVOC in Battle Creek; and Michigan is the licensee of full-time standard broadcast Station WBCK in Battle Creek. In addition, Michigan is the licensee of Stations WBCM (AM) and WBCM–FM in Bay City, Michigan, which is about 130 miles from Battle Creek and outside of Michigan's proposed service area.[2] Comparing ownership of a single daytime-only station to ownership of three full-time stations within the same state, the Judge concluded that WVOC would provide greater diversification of control of the mass media in the area. Michigan argues that since both applicants have other interests in the principal community to be served and neither have interests in the remainder of the proposed service areas, the existence of other Michigan interests warrants only a very slight preference for WVOC, which is outweighed by other decisional factors. WVOC asserts that diversification is a primary objective of the Commission and that it (WVOC) meets that objective.

3. The Board agrees generally with the Judge's conclusions. The fact that both applicants presently own and operate standard broadcast facilities in the community to be served by the proposed FM stations does not significantly reduce the comparative effect of broadcast interests outside of the community. Moreover, while Michigan's ownership of other interests within the state does give WVOC an advantage under the diversification criterion, we believe that it is of greater significance that WVOC's application for its first full-time station in Battle Creek would provide greater diversification of nighttime service to that community than would a grant to Michigan of its second such facility. *Cf. Lynn Mountain Broadcasting*, 9 FCC 2d 854, 11 RR 2d 88 (1967); *Community Broadcasting Service, Inc.*, 2 FCC 2d 53, 6 RR 2d 589 (1965), affirmed as modified 3 FCC 2d 711, 7 RR 2d 503 (1966), reconsideration denied 4 FCC 2d 379, 8 RR 2d 168, affirmed *per curiam* 126 U.S. App. D.C. 258, 377 F. 2d 143, 9 RR 2d 2004 (1967). Therefore, WVOC will be awarded a moderate preference for diversification.

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[1] FM: WKFR–FM, 103.3 MHz, 20 kw, 72 ft., B. AM: WBCK, 930 kHz, 1 kw, 5 kw-LS, DA–2, U, III (licensed to Michigan); WKFR, 1400 kHz, 250 w, 1 kw-LS, U, IV; WVOC, 1500 kHz, 1 kw, DA–D, II (licensed to WVOC). TV: WUHQ–TV, Ch. 41, 1380 kw, 1070 ft.

[2] The Board has accepted an amendment filed by Michigan to reflect the recent divestiture of its Bay City facilities (FCC 73R–319, released September 10, 1973). The instant proceeding is not affected thereby, however. See, *e.g.*, *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 644 n. 11, 27 RR 2d 1379, 1384 n. 11 (1973), review denied FCC 74–139, released February 11, 1974.

BEST PRACTICABLE SERVICE

Integration

4. WVOC is also entitled to a preference for integration. Michigan seeks integration credit for one of its principals, Robert H. Holmes, who is a 50% owner, president and director of Michigan. However, Holmes does not intend to actively participate in the operation of the proposed FM station on a daily basis. Although Holmes will maintain an office at Michigan's station in Battle Creek, and will spend three to six hours daily there,[3] he will have no staff position with the FM station. Moreover, his daily contact and regular conferences with Eugene Cahill, WBCK's general manager,[4] cannot be regarded as the "meaningful convergence of ownership and station management which merits significant weight under the *Policy Statement* [on *Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965)]."[5] *Snake River Valley Television, Inc.*, 26 FCC 2d 380, 387, 20 RR 2d 644, 654 (1970), review denied FCC 71–549, released May 26, 1971. We must conclude, therefore, that Holmes' proposed presence at the FM station does not warrant substantial credit under the *Policy Statement*, *supra*, 1 FCC 2d at 395, 5 RR 2d at 1909–1910. Compare *Veterans Broadcasting Co., Inc.*, 38 FCC 25, 61, 4 RR 2d 375, 417 (1965).[6]

5. In comparison with Michigan's meager showing on integration, WVOC proposes to integrate two of its three principals into the management of its FM station. While this integration will not be one hundred percent on a full-time basis, it is meaningful integration and is definitely superior to Michigan's proposal. WVOC claims that Don F. Price, 75% owner, president and director of WVOC, will serve as the proposed station's general manager; that D. Burdette Price, 5% owner, vice-president and director of WVOC, will serve as program director; and that both will serve on a full-time basis. Don Price is general manager of Station WVOC and also serves as a minister of a local church and produces a religious radio program which is broadcast over WVOC and other stations.[7] A native of Michigan, Don Price has served for over twelve years as a minister in Battle Creek and is also active in several local community organizations. He has been involved with WVOC's AM operation in Battle Creek for approximately nine years. However, the record shows that Price currently devotes only about five hours each weekday to his AM station (about 25 hours a week), and that he will continue to devote the same amount of time to the combined AM–FM operation. In this regard, Michigan has not substantiated its claim that Price's outside commitments will

[3] This is the extent of his present involvement at the AM station. Holmes' outside interests, involving lease arrangements on certain buildings, require minimal attention.

[4] Cahill owns no interest in Michigan, WBCK or the proposed FM station.

[5] In this regard, Holmes testified at the hearing: "No, I could not say that [I supervise and control the various policies of Michigan's three stations]. I offer suggestions." He subsequently indicated that Cahill was responsible for Michigan's programming decisions, such as the addition or discontinuance of particular programs. Furthermore, the record shows that Cahill also conducted Michigan's *Suburban* survey, and prepared and sponsored its *Suburban* exhibits. We note, too, that while it appears Holmes has established Michigan's policy of broadcasting local news, he is not currently involved in the production of such programs.

[6] Michigan is entitled to no credit whatsoever for the proposed participation of staff with no ownership interests in the applicant. See *Triple C. Broadcasting Corp.*, 16 FCC 2d 357, 15 RR 2d 515 (1969), review denied FCC 69–1057, released October 1, 1969.

[7] The church, Family Altar Chapel, is owned by Family Altar of the Air, Inc. (Family Altar), the organization which produces the radio program.

materially detract from his proposed participation at and supervision of the FM station and, in the same regard, Price testified that his ministerial duties do not generally conflict with his present duties at Station WVOC and will not prevent him from devoting such time to both operations.[8] Compare *Lorenzo W. Milam and Jeremy D. Lansman, supra.*

6. Therefore, while Don Price will necessarily be dividing his time between the AM and FM operations, the record establishes that he presently is and will continue to be in close supervision of station affairs on a daily basis, which is the primary goal of the integration policy. *Nelson Broadcasting Company*, 3 FCC 2d 84, 7 RR 2d 146 (1966); *Community Broadcasting Service, Inc., supra.* Moreover, the physical consolidation of the two operations[9] will facilitate more efficient management of time. *WLCY, Inc.*, 17 FCC 2d 338, 15 RR 2d 1287 (1969), review denied FCC 69–944, released September 4, 1969. Slight additional credit is also warranted for the participation of D. Burdette Price as program director. D. Burdette Price, son of Don Price, is program director of Station WVOC, maintains an on-the-air board shift, handles advertising accounts for the existing WVOC station, and serves as associate pastor with his father. He now devotes about one and one-half hours a day to the management functions in question[10] and his testimony that he will devote some additional time to the FM operation is both uncontroverted and credible on its face. In view of all the foregoing, we conclude that WVOC is entitled to a moderate preference for integration.

Comparative Coverage and Auxiliary Power Source

7. As previously noted, Battle Creek has one FM, one television and three AM facilities authorized to it. All areas proposed to be served by either applicant receive at least five aural services day and night. All urban areas proposed to be served by the applicants receive six or more FM services and the most sparsely served areas receive three or four FM services. WVOC proposes to serve 111,386 persons in an area of 349 square miles, while Michigan proposes to serve 133,000 persons in 560 square miles. Thus, Michigan would serve 19.4% more population (21,614 persons) and 60% more area (211 square miles) than would WVOC. Michigan also proposes an antenna height greater than does WVOC and proposes to main an auxiliary power source. Michi-

[8] While we believe that Price's outside activities will preclude his devoting more time to broadcast activities than he does at present, the Commission has held that, upon a showing of active participation in a proposed second station, credit, albeit reduced, may be granted for hours which will be devoted to the operation of both stations. *Bill Garrett Broadcasting Corp.*, 16 FCC 2d 415, 15 RR 2d 743 (1969). The record shows that Don Price currently devotes the hours between 10:00 a.m. and 3:00 p.m. each weekday to his AM station, but that no meaningful participation has been indicated beyond that time period. Prior to 10:00 a.m., he is involved in the creation of a radio program, produced by Family Altar for distribution, which is merely contemporaneously carried over WVOC. *Cf. Lorenzo W. Milam and Jeremy D. Lansman*, 6 FCC 2d 198, 9 RR 2d 204 (1966), review denied FCC 67–644, released June 7, 1967, affirmed *per curiam*, 12 RR 2d 2116 (D.C. Cir., 1968). After about 3:00 p.m. he is not "in telephone contact" with the station, but can be reached by telephone if necessary.

[9] Both applicants propose to locate their FM facilities in the same buildings as their AM operations.

[10] As with Don Price, D. Burdette's current participation in WVOC's AM station may be weighed in evaluating his proposed participation in the FM facility. We again differ with the Presiding Judge regarding the degree of present integration: while the Judge was correct in his view that the younger Price's activities away from the station servicing accounts should be considered as integration in the AM station, such activities are irrelevant to his duties in the proposed operation.

gan contends that its greater coverage of population and area, plus its auxiliary power source, entitles it to a significant preference. The Board agrees fully with the Judge that Michigan's greater proposed coverage is not of substantial importance in light of the abundance of AM and FM service throughout the proposed service areas. See *Resort Broadcasting Co., Inc., supra.* Therefore, only a very slight preference is warranted. Michigan is also entitled to some credit for proposing an auxiliary power source (see *Addendum to Policy Statement*, 2 FCC 2d 667, 6 RR 2d 861 (1966)), but such a preference is intransically of less significance than other aspects of the comparative analysis. See *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 19 RR 2d 942 (1970), review denied 18 FCC 2d 176, 20 RR 2d 1084 (1971).

Proposed Program Service

8. In its designation Order, the Commission found that both applicants were fully qualified to receive a grant, but authorized an inquiry under the standard comparative issue into the comparative need for the respective program service proposed by the applicants in light of WVOC's proposal to devote approximately thirty percent of its programming to specialized, religious programming. Michigan proposes a general market format. At the hearing, WVOC introduced no evidence to establish a comparative need for its program proposal,[11] while Michigan relies on it *Suburban* showing to support its proposal. The Presiding Judge concluded that both applicants failed to show a comparative need for their respective program proposals and recommended that the resolution of the comparative issue be made on other grounds. Michigan now excepts to the Presiding Judge's conclusion, arguing that it should be awarded a preference for programming despite the absence of a showing of need because, it contends, the need for general market programming is presumptive. Alternatively, Michigan claims that its *Suburban* exhibit establishes that a need for its programming proposal exists.

9. The Board agrees with the Presiding Judge to the extent that resolution of the instant proceeding ultimately rests on other grounds, and, therefore, finds no need to resolve the question of whether such a presumption exists.[12] Even if it did, and Michigan were awarded a preference for general market programming, we believe that such a preference could not be controlling in the circumstances of this case. It is well established that the two primary objectives toward which the comparative analysis is directed are diversification of control of the media of mass communications and best practicable service to the public, of which integration is a significant, often decisive factor. See *Policy Statement on Comparative Hearings, supra; Lorain Com-*

[11] Don Price's oral testimony that some persons, whom he did not identify, told him they wanted religious programming is insufficient to show comparative need for WVOC's proposal to broadcast 30% religious programming.

[12] We note, however, that Michigan's Suburban exhibits do not constitute an adequate showing of need for general market programming in Battle Creek. Rather, its exhibits merely indicate, as do WVOC's, that the community has several particular problems to which every applicant, specialized or not, must direct specific programs, as required by the Commission's *Suburban* policy. That policy encompasses an entirely different question than the one now before us, which is to determine whether one particular type of program format should be accorded a comparative preference over another. In this regard, we note that, in contrast to the *Suburban* inquiry, the specialized programming issue does not contemplate the evaluation of specific programs, but only the type of service in general. See *Jay Sadow*, 26 FCC 2d 131, 20 RR 2d 543 (1970).

munity Broadcasting Co., 13 FCC 2d 106, 174, 13 RR 2d 382, 392 (1968), reconsideration denied 14 FCC 2d 604, 14 RR 2d 155, rehearing denied 18 FCC 2d 686 (1969), affirmed *sub nom. Allied Boadcasting, Inc.* v. *FCC*, 140 U.S. App. D.C. 264, 435 F.2d 68, 19 RR 2d 207 (1970). WVOC is clearly entitled to a diversification preference. Furthermore, WVOC's moderate preference for integration outweighs those credits which Michigan receives for coverage and auxiliary power source, as well as any credit which might arguably be accorded for general market programming, and thus entitles WVOC to a preference under the Commission's best practicable service criterion. Together, the preferences accorded WVOC warrant the conclusion that a grant of its application would better serve the public interest, convenience and necessity.

10. Accordingly, IT IS ORDERED, That the application of WVOC, Inc. (BPH–7005) for a construction permit for a new FM broadcast station at Battle Creek, Michigan, IS GRANTED, and the application of Michigan Broadcasting Company (BPH–7045) for the same authorization IS DENIED; and

11. IT IS FURTHER ORDERED, That: Before program tests are authorized, permittee shall file with the Commission sufficient field intensity measurements made on standard broadcast Station WBCK to satisfactorily demonstrate that the Station WBCK daytime and nighttime directional radiation patterns have not changed as a result of permittee's construction. The minimum required measurements, made prior and subsequent to said construction, shall include at least ten (10) consecutive points for each of the radials included in the last complete Station WBCK proofs of performance on file with the Commission. Permittee shall assume responsibility for all costs involved in complying with this condition. During construction, Station WVOC shall determine the operating power by the indirect method and shall maintain the directional antenna system as closely as possible to values appearing in the license. Upon completion of construction, the common point resistance shall be remeasured and the results submitted with FCC Form 302 in Station WVOC's request to determine the operating power by the direct method. In addition, a skeleton proof shall be submitted, consisting of at least five (5) field intensity measurements on each radial measured in connection with the last complete Station WVOC proof of performance filed with the Commission to prove that the directional pattern of Station WVOC has not been changed. Data submitted shall include a tabulation of all pertinent meter indications and the measured fields at the monitoring locations and a sketch of the complete installation showing pertinent dimensions.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON,
Member, Review Board.

104-026—74——13

APPENDIX

Rulings on Exceptions of Michigan Broadcasting Company

Exception No.	*Ruling*
1, 6	*Denied* as being of no decisional significance.
2	*Granted* to the extent indicated in paragraphs 5 and 6 of this Decision; *denied* in all other respects in that the Judge's findings are otherwise accurate and adequate.
3, 4	*Denied* to the extent that Michigan claims that D. Burdette Price devotes only two hours per day to WVOC's existing operation (however, see note 10 to this decision); *granted* in all other respects.
5	*Granted* with regard to the Judge's finding concerning the number of hours D. Burdette Price will devote to the proposed FM operation; and *denied* in all other respects. Price's testimony is sufficiently precise to warrant the conclusion that he will devote somewhat more time to the proposed operation than part of the one and one-half hours per day he currently devotes to his management functions at WVOC.
7, 8, 9, 13, 14	*Denied* in substance. See paragraphs 8 and 9 of this Decision.
10	*Denied* insofar as a *significant* preference is requested. However, see paragraph 7 of this Decision.
11	*Denied* for the reasons stated in paragraphs 4, 5 and 6 of this Decision.
12	*Denied* for the reasons stated in paragraph 3 of this Decision.
15	*Denied* for the reasons stated in the whole of this Decision.

F.C.C. 72D-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WVOC, INC., BATTLE CREEK, MICH.	Docket No. 19272 File No. BPH-7005
MICHIGAN BROADCASTING CO., BATTLE CREEK, MICH. For Construction Permits	Docket No. 19273 File No. BPH-7045

APPEARANCES

Eugene T. Smith on behalf of WVOC, Inc.; *John J. Dempsey* on behalf of Michigan Broadcasting Company; and *William D. Silva* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
CHARLES J. FREDERICK

(Issued September 15, 1972; Released September 21, 1972)

PRELIMINARY STATEMENT

1. By Order released June 29, 1971 (FCC 71-670, 36 Fed. Reg. 12642, published July 2, 1971), the Commission designated the applications of WVOC, Inc. (hereinafter WVOC) and Michigan Broadcasting Company (hereinafter Michigan) for consolidated hearing on the following issues:

(1) To determine which of the proposals would, on a comparative basis, better serve the public interest.
(2) To determine in the light of the evidence adduced pursuant to the foregoing issue, which of the applications for construction permit should be granted.

2. Subsequently, by Memorandum Opinion and Order released December 17, 1971, the Review Board enlarged the issues in this proceeding to include the following issue (32 FCC 2d 765, 23 RR 2d 371):

To determine whether WVOC, Inc. possesses adequate program origination equipment and technical facilities to effectuate its proposed operation, and, if not, the effect thereof upon the applicant's technical qualifications;

3. The Board also, on its own motion, required that a grant of the WVCO application should be subject to the following conditions:

Before program tests are authorized, permittee shall file with the Commission sufficient field intensity measurements made on standard broadcast Station WBCK to satisfactorily demonstrate that the Station WBCK daytime and nighttime directional radiation patterns have not changed as a result of permittee's construction. The minimum required measurements, made prior and subsequent to said construction, shall include at least ten (10) consecutive points for each of the radials included in the last complete Station WBCK proofs of perform-

ance on file with the Commission. Permittee shall assume responsibility for all costs involved in complying with this condition.

During construction, Station WVOC shall determine the operating power by the indirect method and shall maintain the directional antenna system as closely as possible in values appearing in the license. Upon completion of construction, the common point resistance shall be remeasured and the results submitted with FCC Form 302 in Station WVOC's request to determine the operating power by the direct method. In addition, a skeleton proof shall be submitted consisting of at least five (5) field intensity measurements on each radial measured in connection with the last complete Station WVOC proof of performance filed with the Commission to prove that the directional pattern of Station WVOC has not been changed. Data submitted shall include a tabulation of all pertinent meter indications and the measured fields at the monitoring locations and a sketch of the complete installation showing pertinent dimensions.

4. A prehearing conference was held on August 12, 1971, and hearing sessions were held on October 13, 14 and 26, 1971, and January 27, February 17, March 3, 6 and 16, 1972. The record was closed on March 16, 1972. The Broadcast Bureau, in accordance with its usual practice, did not participate in the comparative aspects of this proceeding.

FINDINGS OF FACT

5. This proceeding involves the mutually exclusive applications of WVOC, Inc. (WVOC) and Michigan Broadcasting Company (Michigan), each of which requests a construction permit for a new Class A FM broadcast station in Battle Creek, Michigan to operate on 95.3 MHz (Channel 237A) with an effective radiated power of 3 kilowatts. WVOC proposes an antenna height above average terrain of 161 feet and Michigan, 265 feet. (WVOC proposes to increase the height of an idle tower which was formerly part of the WVOC four-element directional antenna system from 183 to 243 feet and side-mount its FM antenna near the top.) (Michigan proposes to side-mount the FM antenna near the top of the east tower of the WBCK directional antenna system.) The two transmitter sites are located in the southeast sector of Battle Creek, about 0.7 mile apart. WVOC is the licensee of daytime only AM Station WVOC and Michigan is the licensee of unlimited time AM Station WBCK, both in Battle Creek.

Community To Be Served

6. Battle Creek, Michigan has a population of 38,931 and is the largest city in Calhoun County (pop. 141,963). (All population data herein are based on the 1970 U.S. Census—WVOC Exh. 4, p. 1; Michigan Exh. 8, p. 2. Official Notice of the 1970 U.S. Census is made.) The city is not a part of any urbanized area or of any standard metropolitan statistical area. It is located about 20 miles east of Kalamazoo and 39 miles north of the state's southern border. Present broadcast facilities authorized in Battle Creek include one FM, three AM, and one TV stations as follows:

FM: WKFR–FM, 103.3 MHz, 20 Kw, 72 ft., B. AM: WBCK, 930 KHz, 1 Kw, 5 Kw–LS, DA–2, U, III; WKFR, 1400 KHz, 250 W, 1 Kw–LS, U, IV; WVOC, 1500 KHz, 1 Kw, DA–D, II. TV: WUHQ–TV, Ch. 41, 498 Kw, 320 ft., CP.

Comparative Coverage

7. The predicted 1.0 mv/m contours of the proposals substantially describe concentric circles. As noted, the height above average terrain of the antenna proposed by Michigan is greater than that proposed by WVOC. Accordingly, Michigan's proposed 1.0 mv/m contour completely encompasses the proposed 1.0 mv/m contour of WVOC. The coverage of the two proposals differs as follows:

	Distance in miles to 1.0 mv/m contour	
	WVOC	Michigan
North	11.0	14.0
Northeast	11.0	14.0
East	11.0	13.5
Southeast	10.0	13.0
South	9.9	13.3
Southwest	9.2	12.0
West	9.5	12.5
Northwest	12.5	15.5

8. The populations and areas encompassed within the respective 1.0 mv/m contours are as follows:

Applican	Population	Area (square miles)
WVOC	111,386	349
Michigan	133,000	560
Differential area served by Michigan	21,614	211

Michigan proposes to serve 19.4% more population and 60% more area than does WVOC.

9. At night, the primary service area of Michigan's AM station, WBCK, is limited to the 9.4 mv/m interference-free contour, which is entirely encompassed within Michigan's proposed FM 1.0 mv/m contour. Michigan's nighttime AM service area contains 130 square miles compared to 560 square miles within its proposed FM service area. Thus, its FM proposal would serve an area more than four times as great as that contained within its nighttime AM service area.

10. Michigan expresses a need for an FM station to compensate for pre-sunrise interference received by its AM station, WBCK, when operating with its nighttime directional antenna pattern between 6:00 A.M. and sunrise, local time, for the purpose of providing information such as news, weather, road and traffic conditions, etc., and to supply informational announcements to members of its audience before they leave for work or school. The specific hours involved are as follows: [1]

[1] According to the Commission's license files, Station WBCK presently has no pre-sunrise authorization to use any facilities other than its licensed nighttime facilities. Official Notice of license files is made.

Month:	Time
January	6 a.m. to 8:15 a.m.
February	6 a.m. to 7:45 a.m.
March	6 a.m. to 7 a.m.
September	6 a.m. to 6:15 a.m.
October	6 a.m. to 7 a.m.
November	6 a.m. to 7:30 a.m.
December	6 a.m. to 8 a.m.

Availability of Other Services

11. FM service (1.0 mv/m or greater) is presently provided within the respective proposed FM 1.0 mv/m contours and the differential area as follows:

Station [1]	Location in Michigan	WVOC	Michigan	Differential area [2]
		1.0 mv/m contour	1.0 mv/m contour	
WJFM	Grand Rapids	100	100	100
WOOD-FM	do	100	100	100
WKFR-FM	Battle Creek	100	75-100	75-100
WVGR	Grand Rapids	75-100	75-100	75-100
WSEO-FM	Kalamazoo	50-75	75-100	50-75
WALM-FM	Marshall	50-75	50-75	25-50
WANG	Coldwater	[3] 50-75	50-75	50-75
Minimum		4	3	3
Maximum		7	7	6

[1] Educational FM stations WKAR-FM, East Lansing, Mich. and WMUK, Kalamazoo, Mich. are not included.

[2] Tabulations of other existing partial services to the WVOC and differential areas are not included in the exhibits; however, this determination can be made by superimposing the contours on p. 9 of Michigan ex. 8 on p. 6 of that exhibit using appropriate mileage scales.

[3] Latest construction permit.

Areas receiving three or four FM services lie in rural areas 10 to 15 miles south of the center of Battle Creek. All urban areas proposed to be served receive six or more FM services.

12. The sparsely served areas within the respective proposed 1.0 mv/m contours include the following populations and areas:

Number of other existing FM services	WVOC	Michigan	Differential area
3		530 persons in 11 sq. mi.	530 persons in 11 sq. mi.
4	Undisclosed population in less than 1 sq. mi.	950 persons in 15 sq. mi.	950 persons in 15 sq. mi. less undisclosed pop. in 1 sq. mi. served by proposed WVOC.

13. Class I–A Station WJR, Detroit, Michigan and Class I–B Station WOWO, Ft. Wayne, Indiana provide AM primary service (0.5 mv/m or greater) day and night to all of the areas receiving three or four services. As a result, all areas proposed to be served by either applicant receive at least five aural services day and night.

Program Origination Equipment and Technical Facilities Proposed by WVOC, Inc.

14. With respect to the issue added by the Review Board to determine whether WVOC, Inc. possesses adequate program origination equipment and technical facilities to effectuate its proposed operation, evidence introduced by WVOC, Inc. resolved the technical aspect of the issue to the satisfaction of both Michigan and the Broadcast Bureau and therefore the issue is moot.

Comparative Issues

15. At the cost of some repetition, it is noted that WVOC proposes to operate with an effective radiating power of 3 kw (horizontal and vertical polarization) with an antenna height of 161 feet above average terrain. WBCK proposes to operate with an effective radiating power of 3 kw (horizontal and vertical polarization) with an antenna height of 265 feet above average terrain. The predicted 1.0 mv/m (60 dbu) contours of each applicant with respect to area and population served are as follows:

	WVOC	WBCK
Population	111,386	133,000
Area (square miles)	349	560

16. In the area to be served by WVOC, three FM broadcast stations serve 100% of the area: WOOD–FM, Grand Rapids, Michigan; WJFM, Grand Rapids, Michigan; and WKFR–FM, Battle Creek, Michigan. Partial FM service from Stations WVGR, Grand Rapids, Michigan; WSEO–FM, Kalamazoo, Michigan; WALM–FM, Marshall, Michigan; and WANG, Coldwater, Michigan, bring the minimum number of services for the WVOC proposal to four, with a maximum number of seven. The area having only four services is rural in character, but the area does receive AM primary service, day and night, from Station WJR, Detroit, Michigan.

17. In the area to be served by WBCK, two FM broadcast stations serve 100% of the area: WJFM, Grand Rapids, Michigan; and WOOD–FM, Grand Rapids, Michigan. Partial FM service from Stations WKFR–FM, Battle Creek, Michigan; WVGR, Grand Rapids, Michigan; WSEO–FM, Kalamazoo, Michigan; WALM–FM, Marshall, Michigan; and WANG, Coldwater, Michigan, bring the minimum number of services for the WBCK proposal to three, with a maximum number of seven. Where there is an area, rural in character, with three or four FM services, Stations WJR and WOWO, Ft. Wayne, Indiana, will provide day and night 0.5 mv/m service to the WBCK proposal.

18. WBCK maintains a 25 KVA emergency generator capable of delivering approximately 25,000 watts of emergency power.

Nontechnical Considerations

WVOC, Inc.

19. WVOC is a Michigan corporation authorized to issue 250 shares of $100.00 par value common voting stock, of which 180 shares have

been issued to three persons. The officers, directors and stockholders of WVOC are as follows:

Don F. Price, 445 Iroquois, Battle Creek, Mich.	President, director, and 75 percent stockholder (135 shares).
Evangeline M. Price, 445 Iroquois, Battle Creek, Mich.	Secretary, director, and 20 percent stockholder (36 shares).
D. Burdette Price, 14840 Six and a Half Mile Rd., Battle Creek, Mich.	Vice-president, director, and 5 percent stockholder (9 shares).

20. Don F. Price is a native of Michigan. Except for a brief period, Mr. Price has spent his life in Michigan. He spent four years in a Bible and Junior College at Owosso Seminary, Owosso, Michigan. Following graduation, he accepted a pastorate at Armbrust, Pennsylvania, and stayed there for three years. Further pastorate work at churches in Sunbury and Stroudsburg, Pennsylvania completed a ten year period of time in that state. In 1935 he accepted a pastorate in Detroit, Michigan. Moving to Muskegon, Michigan after seven years, Mr. Price continued religious radio broadcasting by inaugurating the Family Altar of the Air program, from his home, and this program has continued to date in Battle Creek, Michigan. Thus, for over 12 years Mr. Price has served as a minister of a church in Battle Creek, Michigan, and for approximately nine years he has been an officer, director and principal stockholder of Station WVOC, Battle Creek. Mr. Price is also active in the Battle Creek Exchange Club, the Battle Creek Chamber of Commerce, the Battle Creek Sportsman's Club, and is a member of a local Ministerial Association.

21. Don F. Price is the General Manager of Station WVOC, and will serve as the General Manager of WVOC's proposed FM station. Mr. Price begins initial contact with Station WVOC at approximately 8:00 A.M. to 8:30 A.M. and is at the station in person between 9:30 A.M. and 10:30 A.M. In addition to his activities as General Manager of Station WVOC, Price conducts a daily telephone call-in program over Station WVOC, and stays at the station until 2:00 P.M. or 3:00 P.M. each weak-day. After 3:00 P.M. he is "in and out" of the station but does maintain telephone contact with the station. His office is at station WVOC.

22. WVOC maintains the following daytime only broadcast schedule:

Month	Sign-on a.m.	Sign-off p.m.	Month	Sign-on a.m.	Sign-off p.m.
January	8:15	5:30	July	6:00	8:15
February	7:45	6:15	August	6:00	7:45
March	7:00	6:45	September	6:15	6:45
April	6:00	7:15	October	7:00	6:00
May	6:00	8:00	November	7:30	5:15
June	6:00	8:15	December	8:00	5:15

23. D. Burdette Price, son of Don F. and Evangeline M. Price, was born on June 7, 1932, in Stroudsburg, Pennsylvania. He attended high school in Muskegon, Michigan, and from 1951 to 1954 served with the Armed Forces and was honorably discharged from the 82nd Paratrooper Division, Fort Bragg, North Carolina. In June of 1961, Mr. Price graduated from Owosso College with a Bachelor of Science

degree with majors in religion and psychology. He is an ordained minister serving with his father as associate pastor of the Family Altar Chapel church in Battle Creek. D. Burdette Price is Program Director of Station WVOC, and will serve as Program Director of WVOC's proposed FM station. He holds a First Class Operator's license, maintains an on-the-air board shift at Station WVOC, and handles advertising accounts for Station WVOC. Mr. Price is married, the father of three children, serves as President of the Evangelical Ministerial Association in Battle Creek, writes a weekly column directed to young people for a "news shopper" publication and serves as the Chaplain of the Optimists Club in Battle Creek.

24. D. Burdette Price devotes at least six to seven hours each day, excluding Sunday, to his duties at Station WVOC, and he will devote a comparable amount of time to WVOC's proposed FM station. On occasion he will handle Station WVOC's remote authorization broadcast system which, according to his testimony, is the only mobile broadcast system in the community.

Michigan Broadcasting Company

25. Michigan is a Delaware corporation authorized to engage in radio broadcasting in the State of Michigan. Its offices are in Battle Creek. It is the licensee of WBCK (930 kHz, 5 kw–D, 1 kw–N) in Battle Creek and WBCM (1440 khz, 1 kw–D, 500 w–N) and WBCM–FM (96.1 MHz, 97 kw. Ant. 420 ft.) in Bay City, Michigan. WBCK's transmitter and studios are located at 390 Golden Avenue.[2] The proposed FM facilities, including transmitter, studios and antenna, will be located at the same address. Radio broadcasting is its sole business.

26. The capitalization of the corporation consists of 10,000 shares of common voting stock with a par value of $10.00 each. Four thousand shares of stock are issued and outstanding. The following are the officers, directors and stockholders, all residents of the United States and Battle Creek.

Name	Office	Shares	Percent
Robert Harmon Holmes	President and director	2,000	50
David Noyes Holmes	Secretary, treasurer, and director	2,000	50
Margaret Ellen Holmes	Director		

27. Michigan Broadcasting Company was founded in 1946. The station commenced operations with 1 kw day and night, 930 kc, DA 2 in July 1948. On June 7, 1961, WBCK received a CP for increase in daytime power to 5 kw (effective July 27, 1961). Its application for license to cover construction permit was granted May 16, 1962. In 1955, WBCM–AM and FM in Bay City, Michigan were acquired by this applicant. The need for increased studio space in Battle Creek and the desire to consolidate both technical and studio facilities in one location was fulfilled by the construction of WBCK's new broadcast center at WBCK's transmitter site in 1964.

[2] Bay City is approximately 130 miles from Battle Creek.

28. In the beginning, WBCK was affiliated with the Mutual Broadcasting System. In 1959, WBCK became an affiliate of the National Broadcasting Company.

29. In 1963, WBCK purchased the city-owned weather equipment and was named the Official Meteorological Reporting Station by the U.S. Weather Bureau. WBCK retained the services of an experienced weather consultant to maintain the equipment and keep records. The official designation was dropped in 1970 when WBCK's weather consultant moved from the area. Now, WBCK's own staff does the maintenance and recording. WBCK also maintains a 24-hour telephone weather service called "Teleweather" which is the only service of its kind in the area.

30. WBCK is a member of the National Association of Broadcasters and the Michigan Association of Broadcasters. As a guide for programming and advertising standards, WBCK subscribes to the NAB Code of Good Practices.

31. The WBCK broadcast center is located on an 18 acre site and was constructed and designed to facilitate additional expansion. The present facilities contain three studios including a master control. One is devoted to full-time recording purposes—the others are in continuous operation for live broadcasts. Additional recording facilities are in the planning stage. The building houses a news room, copy room, transmitter room, engineering workshop and numerous offices for bookkeeping, sales, management, production and engineering. Also, included are a record library, lounge, reception room and radioactive fallout shelter built according to government specifications. This includes shielded walls and special ceiling ventilation and water access plus broadcast equipment and radiation counters. This was one of the first so-called "hardened sites" under the EBS program of the Federal Government. Three current employees have taken the required Civil Defense course in radiological school.

32. In connection with its proposed FM facilities, Michigan plans to expend approximately $28,000 for equipment and an additional $7,000 in remodeling.

33. The President of Michigan, Robert Harmon Holmes, is 65 years of age and was born in Battle Creek where he has resided all his life. He graduated from the University of Michigan in 1930 and from that year until 1936 was associated with his father in operating an agency for the sale of Ford automobiles. In 1937, he went into business for himself and became a dealer and distributor for Studebaker cars. He later became President and sole owner of Robert H. Holmes, Inc., a local Buick agency which he operated until 1967. From August 1943 until January 1946, he served in the United States Navy, from which he was honorably discharged. He is married and the father of three children. He has participated actively over the years in local civic affairs.

34. Mr. Holmes maintains an office at the WBCK studios and normally spends from three to six hours daily at the office. He is in daily contact with the General Manager, Eugene Cahill, whose office is next door, and confers regularly with him about station affairs. His only outside interests involve lease arrangements on certain buildings which house an auto agency and a retail grocery supermarket. These business enterprises require minimum attention and his principal business ac-

tivity is in connection with Michigan. He is primarily responsible for the station's local news coverage. Holmes has accompanied the General Manager to meetings with the NBC network each year and, most years, to meetings of the Michigan Association of Broadcasters. He was among the original group of broadcasters who founded the Michigan Association of Broadcasters in 1949.

35. David Noyes Holmes, brother of Robert Holmes, was born in Battle Creek, Michigan on August 7, 1908, where he has resided all his life. He graduated from the Battle Creek High School and attended the University of Michigan for three and one-half years. He was engaged in operating a Ford dealership in Battle Creek from 1935 until 1960. During this time, he served as a director of the National Automobile Dealers' Association. He is married and the father of three children. Margaret Ellen Holmes, wife of David Noyes Holmes, was born in Saginaw, Michigan on August 14, 1915. She has resided in Battle Creek ever since her marriage in December, 1934. She graduated from high school and completed one year at the Connecticut College for Women. Although Robert and David Holmes see each other about twice a week when David is in Battle Creek, David does not, on a regular basis, actively participate in station affairs and no "integration" credit is sought for him.

36. Since WBCK is an unlimited station, Michigan will utilize its existing AM physical plant and staff for its proposed FM operation. Michigan cost estimates for its proposed FM station provide for one added staff person in traffic, one added staff person in announcing/production and over-time in AM personnel utilized.

37. Michigan supplied data as to its staff's broadcast experience, duties, etc., but there is no relevant issue in the case appertaining thereunto.

Programming

WVOC

38. Don F. Price testified that the religion and religious music programming would consist of some of the programs now carried on Station WVOC, transferring same to WVOC's proposed FM station, and utilizing the early morning and nighttime operation of FM to reach listeners with religious programs. Mr. Price testified that many of the people contacted expressed a desire for fine religious programming and "typical" FM music. Specific names concerning an expression of religious or religious music need were lacking. In the WVOC application, Section IV–A, Part I, paragraph 1.B., Exhibit No. 4, the following persons contacted by the applicant gave expressions of interest on FM programming: [3]

2. L. D. Funk—(b) Need more representation of the people on the radio.

12. Sister Mary Charlene Curt—(c) Need improving and more comprehensive communication via television, radio and newspaper might be realized as a by-product of increased competition.

19. Mrs. R. L. Brumfield—(c) An FM station with semi-classical, popular and gospel music would be an asset, also.

24. Henry Owen Berends—(a) Need an FM station featuring top quality music!

[3] The paragraph numbers and names are listed in numerical order as reported in the Exhibit.

29. Clarke M. Valentine—(a) More down-to-earth programming.
31. Miss Sandra Williams—(d) Need more gospel music that the young will enjoy.
33. Rev. Harold W. Speights—(a) Need a new FM station.
55. Robert L. Brumfield—(b) Need a good FM station, offering good music.
67. Mrs. J. W. Smothers—(b) It would be nice to have an all Christian FM station.
72. Sandra Gallaway—(a) Need some inspirational music for the late listeners.
77. Henry L. Eilers—(c) Need FM station with informational and educational programs to inform the average "man on the street" how he can benefit from consolidation.

39. WBCK, in its application, and in its Exh. No. 5 (WBCK Exh. #5, page 1) stated that its proposed FM programming is " * * * based on its familiarity with Battle Creek as the licensee of WBCK for the last 23 years * * *." and that its program format will consist of a basic "good music" format. No testimony was offered with respect to "general market programming", or the need therefor.

Michigan

40. Michigan will not duplicate the programming of any AM station and proposes a general market programming format, with no particular emphasis upon any single type of programming. The objective of Michigan is to serve all segments and age groups. Michigan will broadcast 140 hours during a typical week devoting 8% of its programming to news; 3% to public affairs; and 2% to all other exclusive of entertainment and sports.

41. The entertainment format will consist of stereo music of the standard popular variety (such as show tunes and pop concert) with a small variety of light classical music.

42. Michigan will devote ten and one-half hours weekly to news. The staff will have at their disposal the United Press Teletype News Service, a 24-hour weather teletype service from the ESSA weather bureau, a police radio tuned to local emergency bands, tape recorders, built-in and portable. In addition to its regular news reports, Michigan proposes to broadcast weekly on Saturday at 12:30 P.M. "School Report", a 15-minute program for area schools and colleges to report school news, curricular changes, and other information of interest to both students and parents.

43. Michigan proposes to devote an average of approximately four and one-half hours a week to public affairs programming. Public affairs programming will consist of:

The Black Community—A 15-minute program.
Mayor's Report—A 15-minute program.
Proceedings of the Battle Creek City Commission—About 50 times a year (from 30 minutes to two hours each).
Talk of the Times—A 30-minute program.
Battle Creek Today—A series of 5-minute programs, three or four times a week.
Illegal Drug Traffic—Cause and Effect—A 30-minute program on Saturday afternoons.
Background—A 30-minute program which will be carried weekly (Saturdays) at 7:30 P.M., prepared by the University of Michigan, featuring guest lectures by staff professors dealing with topics of current interest.

44. All other programs will consist primarily of instructional, educational and religious programs and will include:

Men and Molecules—A 15-minute program which will be broadcast weekly on Sundays at 6:15 P.M. (Science presented in layman terms.)

Religious Hour—A one-hour program carrying the services of various area churches broadcast Sundays at 11:00 A.M.

Studio Showcase—A five-minute program which will feature outstanding students from the University School of Music.

CONCLUSIONS

1. The Commission's order (5 RR 2d 1901) delineates two primary objectives toward which the process of comparing mutually exclusive applications should be directed. These objectives are:

(1) The best practicable service to the public, and
(2) A maximum diffusion of control of the media of mass communications.

2. In the captioned proceeding, two Battle Creek, Michigan broadcasting enterprises seek authority to construct new FM broadcast stations in that community. Each applicant proposes maximum power on the assigned FM channel. Neither applicant proposes maximum height for its antenna. One applicant (WBCK) proposes an antenna height greater than the other (WVOC), and WBCK also proposes to maintain an auxiliary power source. The latter two factors could be adjudged to warrant a slight preference for the WBCK proposal. However, the difference in comparative FM coverage must be viewed in connection with the quantitative/qualitative character of the proposed FM coverage.

3. WVOC and WBCK contend that integration of ownership and management is a factor to be considered in both FM applications. WVOC's integration factor consists of its President and majority stockholder, and its Vice-President and minority stockholder. WBCK's integration factor consists of its President and 50% stockholder. Accordingly, WVOC is preferred on this comparative criterion.

4. WBCK's ownership of three other fulltime broadcast stations within the State of Michigan is a factor to be considered in weighing the question of diversification of control of mass media. WVOC's ownership of a single daytime only standard broadcast station within the State of Michigan is a factor weighing in its favor.

5. Upon the testimony offered with respect to WVOC's program origination equipment issue, it can be concluded that WVOC has met its burden of proof, and the conclusion is warranted that WVOC is qualified within the meaning of the added issue.

6. Neither applicant has completely met its burden of proof with respect to the "needs" of religious v. general market programming. However, the failure is not fatal in that *the Commission's designation Order did not specify the same on a disqualifying* basis. The ultimate conclusion must come from the two primary objectives specified by the Commission, *supra*. WVOC, by providing greater diversification of control of the mass media in the area, and by providing greater full-time participation by station owners, should ultimately prevail with respect to a grant of its FM application.

7. Thus, it is concluded in light of the evidence adduced in the captioned proceeding, that the application of WVOC, Inc. for a FM construction permit on 95.3 mcs Channel 237A, for Battle Creek,

Michigan, should be granted, and that the application of Michigan Broadcasting Company be denied.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of WVOC, Inc. for a construction permit for a new Class A FM broadcast station in Battle Creek, Michigan to operate on 95.3 MHz (Channel 237A) with an effective radiated power of 3 kilowatts is granted subject to the condition imposed by the Review Board in its Memorandum Opinion and Order released December 17, 1971 (32 FCC 2d 765, 23 RR 2d 371), page 2, paragraph 3, *supra*, and the application of Michigan Broadcasting Company for the same facility is denied.

FEDERAL COMMUNICATIONS COMMISSION,
CHARLES J. FREDERICK,
Administrative Law Judge.